THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-39-01554

Appellate Case No. 2014 - 000642

Julie Freeman..Appellant – Respondent

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley.....................Respondent – Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Was the trial court correct in denying Hendrick's Motion for JNOV after the jury found that Hendrick charged closing fees in a manner that its own Vice President of Transaction and Compliance admitted was unfair?

2. Was the trial court correct in adopting a definition of the term "Closing Fee" as used in S.C.Code Ann. § 37-2-307 that was consistent with consumer protection (the purpose behind the statute), the administrative interpretation, and the usual and customary meaning of the term?

3. Was the trial court correct in rejecting Hendrick's arguments that Julie Freeman's exclusive remedy was a cause of action under S.C.Code Ann. § 37-5-202?

4. Was the trial court correct in ruling that Ms. Freeman may represent all other car purchasers who paid closing fees to Hendrick under S.C.Code Ann. § 56-15-110(2)?

5. Was the trial court correct in only charging law to the jury that was applicable to the evidence and issues presented at trial?

6. Did the trial court abuse its discretion in selecting a general jury verdict form when the jury instruction fully described the law and process for the jury to follow?

7. Was the trial court correct in denying a new trial nisi remittur when there was no compelling evidence to invade the jury's province?

8. Was the trial court correct in applying the mandatory language in S.C.Code Ann. § 56-15-110(1) and doubling the actual damages established by the jury?

STATEMENT OF THE CASE

This action was initiated on August 29, 2006. [R.p. __ Complaint.]. On January 30, 2007, this case was designated complex by the Honorable Doyet A. Early, III who also assigned the case to himself for pre-trial purposes. [R.p. __, January 30, 2007, Order.]. By Order dated, July 11, 2012, this Court assigned Judge Early to this case for trial and disposition purposes. [R.p., ___ July 11, 2012, Supreme Court Order].

On October 9, 2006 with an amendment on November 17, 2006, J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley ("Hendrick") filed a motion to dismiss. This Motion was denied by Order dated July 31, 2007. [R.p. __ July 31, 2007, Order].

On May 28, 2009, Ms. Freeman[1] filed a motion seeking a declaratory judgment as to the meaning of terms in S.C.Code Ann. § 37-2-307. [R.p. __, motion]. This motion was fully briefed by both sides. [R.p. ___, Plaintiffs' Memorandum in Support of Motions 6/2/09; R.p.__, Reply to Defendants' Memoranda in Opposition 11/19/09; and R.p. __, Memorandum of Defendant 11/16/09]. However, Hendrick argued that the motion should not go forward until venue issues were clarified. Another defendant, Taylor Toyota, willingly allowed its motion to be argued. After hearing argument, on January 11, 2010, Judge Early ruled on the declaratory judgment motion in the Taylor Toyota case only and defined the term "closing fee" as used in S.C.Code Ann. § 37-2-307 as follows: "A 'closing fee' is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only

[1] Julie Freeman is now married and has changed her name to Julie Hair. The Court of Appeals ordered that the caption should read Julie Freeman. For ease of reference and consistency with the caption, Appellant-Respondent's counsel will refer to her as Ms. Freeman herein.

those actually incurred by the dealer and necessary to the closing of the transaction." [R.p. __, January 11, 2010 Order at 13].[2]

On December 18, 2012, at the request of Hendrick and Ms. Freeman, Judge Early issued an Order adopting the declaratory judgment and its definitions from the Taylor Toyota case for use in this case. [R.p. __, December 18, 2012 (filed 12/28/12) Order].

Ms. Freeman filed an Amended Complaint on June 16, 2013. [R.p. __ Amended Complaint]. Ms. Freeman alleged that Hendrick was charging illegal closing fees in violation of S.C.Code Ann. § 37-2-307 and § 56-15-10, *et seq*. because Hendrick's closing fees were not for reimbursing its closing costs. [Id.]. Ms. Freeman brought this case individually and on behalf of all others who were charged illegal closing fees in the four years prior to the filing of the Complaint. [Id.].

On February 4, 2013, Hendrick filed a Second Amended Motion to Establish Procedural Requirements, Declare the Scope of the Plaintiff Group, and Require Plaintiff to Give Notice to the Plaintiff Group. The Parties appeared before Judge Early to argue this motion on February 21, 2013. [R.p. __, Order submitted March 18, 2013]. At the hearing, Ms. Freeman Hair agreed to provide notice and an opportunity to opt out to all similarly impacted customers. [Id.]. Judge Early declined to revisit his prior ruling with respect to Rule 23, SCRCP. [Id.]. The Parties also agreed that the only portion of the case that would be tried by a jury was the claim for violating the Dealers Act which included all purchasers in the four year period prior to the filing of the Complaint. [Id.].

[2] The *Ritz v. Taylor Toyota* case was later tried before a jury with different facts but a similar jury charge. That jury found that Taylor Toyota had properly charged closing fees to reimburse itself for its closing costs and rendered a defense verdict.

Ms. Freeman then hired an administrator and notified all impacted customers about the lawsuit, the trial date, and the fact that they would be bound by the jury verdict if they did not opt out. [R.p. __, May 14, 2013, Order regarding Notice to the Plaintiff Class]. The language of this notice was crafted and agreed to by Hendrick's and Ms. Freeman's lawyers and approved by the Court. [Id.].

On September 5, 2013, Judge Early denied Hendrick's Motion for Judgment on the Pleadings. [R.p. __, September 5, 2013 Order]. By Order dated September 10, 2013, Judge Early denied in part and granted in part a Hendrick's Motion for Summary Judgment based on the voluntary payment doctrine and other grounds. [R.p. __, September 10, 2013 Order].

This case was tried in Pickens County in September 2013 and twelve jurors unanimously found that Hendrick Honda had arbitrarily and unfairly charged closing fees that were not levied for the purpose of reimbursing closing costs. [R.p. __, jury verdict form.]. The jury found that all of the arbitrary closing fees must be returned and awarded $1,445,786.00 to Ms. Freeman and the affected customers. [Id.].

On September 30, 2013, Ms. Freeman filed post-trial motions requesting that the Court award prejudgment interest, double damages, and award attorneys fees and costs under the Dealers Act. [R.p. __ Freeman Double Damages Motion, R.p. __, Freeman Attorneys Fees and Costs Motion, R.p. __, Freeman Prejudgment Interest Motion.]. Hendrick moved for a new trial or judgment notwithstanding the verdict ("JNOV") on September 27, 2013. [R.p. __, Hendrick Post Trial Motions]. After hearing argument on December 4, 2013, the trial court denied Hendrick's post-trial motion, granted Ms. Freeman's motion to double damages and denied Ms. Freeman's motion for pre-judgment interest. [R.p. __, March 14, 2013 Order denying

prejudgment interest, March 13, 2014 Order granting motion to double damages and March 17, 2014 Order Denying Hendrick's Post Trial Motions]. The Parties agreed to a Consent Order establishing the amount of attorneys fees and costs that was contingent on the outcome of this appeal.

Ms. Freeman filed a Notice of Appeal of the Order denying prejudgment interest on March 19, 2014. Hendrick filed this cross-appeal on April 4, 2014.[3]

FACTS

This case arises from Hendrick charging "closing fees" to its customers that were in no way calculated to reimburse Hendrick for its actual closing costs. Hendrick charged Julie Freeman a $299.00 closing fee that was on some paperwork referred to as a "PROCUREMENT FEE" and on other paperwork referred to as "Administration Fee." [R.p. __, Plaintiffs' Exhibit 3a, Worksheet and R.p. __, Plaintiffs' Exhibit 5, Bill of Sale].

Ms. Freeman alleged that Hendrick violated the law by charging a closing fee to its customers that was not calculated to reimburse itself for its actual closing costs. [R.p. __ Amended Complaint]. Ms. Freeman alleged that this was an "unfair" act in violation of S.C.Code Ann. § 56-15-30[4]; and an "arbitrary" act in violation of S.C.Code Ann. § 56-15-40

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[3] Hendrick's "Statement of the Case" includes references to a settlement agreement entered into with CarMax. This settlement agreement with another car dealership, like several other similar settlement agreements with other defendants, has nothing to do with the issues in this appeal. Regardless, because the settlement is mentioned by Hendrick, it is noteworthy that since that settlement CarMax has not charged a closing fee to its customers. Furthermore, the settlement agreement at the request of CarMax was settled under Rule 23, SCRCP. The claims against CarMax like the claims against Hendrick satisfy the elements of both Rule 23, SCRCP and S.C.Code Ann. § 56-15-110(2).

[4] S.C.Code Ann. § 56-15-30(a) provides: "(a) Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful."

(a).[5] [Id.]. Ms. Freeman also alleged that the fees did not fall within the narrow exception to closing fee illegality[6] included in S.C.Code Ann. § 37-2-307[7] (the "Closing Fee Statute") because the fee was not charged to reimburse the dealer for its closing costs. [Id.].

At trial, Hendrick admitted that it had known since 2001 that closing fees under S.C.Code Ann. § 37-2-307 could only be charged to reimburse Hendrick for closing costs such as document preparation, document retrieval, and document storage. [R.p. ___, trial transcript, p. 303, ll. 2-6; p. 303, ll. 10-15, p. 305, ll. 9-17, p. 307, ll. 7-24, p. 467, ll. 8-22, p. 538, ll. 16-20]. Hendrick posted signs in "multiple conspicuous places" "throughout the dealership" stating that Hendrick's purpose behind charging closing fees was as follows: "This dealership charges a $299 closing fee as a means of reimbursing itself for certain overhead costs, such as document retrieval and document preparation." [R.p.__, trial transcript, pp. 299, ll. 11-22; p. 386, ll. 4-15 and R.p. _, Plaintiff's Exhibit 2]. Hendrick also instructed its employees to tell customers that the fees were being charged to reimburse Hendrick for closing costs such as document preparation, document storage, and document retrieval. [R.p. __, trial transcript, p. 368, ll. 4-11

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[5] S.C.Code Ann. § 56-15-40 provides: "(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public."

[6] A history related to the enactment of the Closing Fee Statute was presented to the trial court in Ms. Freeman's briefing on the declaratory judgment motion at issue on this appeal. [R.p. __, Reply on Declaratory Judgment Motion]. The enactment of a statute legalizing closing fees definitively shows that charging closing fees in absence of meeting the statute's requirements is illegal.

[7] S.C.Code Ann. § 37-2-307 provides: "Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership."

(salesman's standard explanation of fee); p. 404, ll. 5-18 (F&I manager's standard explanation of fee), p. 405, ll. 9-13 and 17-21].

Significantly, Hendrick admitted that it would be unfair to charge closing fees that were not tied to reimbursing their actual closing costs. Hendrick's Vice President in charge of making sure Hendrick complied with statutes, including the Closing Fee statute[8], testified as follows:

> Q: [I]f you're going to name a fee an administrative fee, that fee should be for the administrative costs associated with the closing; is that correct?
> A: Of document retrieval and document preparation.
> Q: Now, with that being said, in order to be for a reimbursement of a document retrieval, a document preparation, shouldn't the dealership figure out how much it cost to do those items before they seek reimbursement for them?
> A: I would say that's fair.
> Q: Would it be fair for a dealership to charge a closing fee that is not tied to their actual closing costs?
> A: I would say no.

[R.p. __, trial transcript, p. 308, l. 17 to p. 309, l. 6].

Despite the above admissions in testimony published at trial, it was established that Hendrick's closing fee was not tied to reimbursing Hendrick for its actual closing costs, that Hendrick never calculated its closing costs, and that Hendrick Honda "didn't sit there and do the math" to figure out what costs the closing fee covered before they set the fee. [R.p. __ trial transcript, p. 124, ll. 6-16; p. 125, l. 13 to p. 126, l. 1; p. 126, l. 9 to p. 127, l. 13]. Similarly, Hendrick's expert witness admitted that he did not see anything to suggest that Hendrick did any kind of analysis at the time Hendrick set the closing fee. [R.p. __, trial transcript, p. 763, l. 25 to p. 764, l. 11.]. In other words, Hendrick Honda unfairly and arbitrarily pulled a number out of the air and called it a closing fee in effort to make a hidden profit.

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[8] [Rp. __, trial transcript p. 303, ll. 16-23, p. 301, l. 12 to p. 302, l. 23 (job responsibilities).

Additionally, on cross-examination Hendrick's general manager admitted that Hendrick raised its closing fees fifty dollars per car in years after its total costs went down and the costs per car sold had stayed essentially the same. [R.p., ___, trial transcript, p. 551, l. 13 to p 555, l. 22; p. 561, ll. 4-15; and p. 564, ll. 1-7].[9] Thus, the closing fees were not tied to reimbursing closing costs but were padding profits for Hendrick.

The testimony further revealed that Hendrick's increase in the amount of its closing fees correlated not with an increase in closing costs but instead with Hendrick increasing senior management pay. [R.p. trial transcript, p. 564, ll. 8-21; p. 565, ll. 1 to p. 568, l. 7].

In summary, the evidence showed that the closing fees were charged not for the permissible purpose of reimbursing Hendrick for actual closing costs such as document preparation and document retrieval but, instead, Hendrick charged unsupported closing fees to increase profit and senior management pay.

After hearing the aforementioned evidence, the jury found that all the closing fees collected, including the closing fee paid by Ms. Freeman, were unfair and arbitrarily set and returned a verdict returning the fees to Freeman and the impacted customers. [R.p. __, Verdict form].[10]

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[9]Hendrick's 30(b)(6) had testified in his deposition that Hendrick raised its closing fee amount to cover expenses going up $200,000.00 to $300,000.00 a month which was not true. At trial the general manager tried to explain this lie by stating: "I was off back surgery. I stood up for eight or nine, ten hours, with you guys. Y'all pounded me. I had a cold as bad as I could..." [R.p. __, p. 556, l. 23 to p. 557, l. 6]. Obviously, as shown by the verdict, the jury did not buy the excuses offered by the general manager. Hendrick's attempt to lie about the cost increase led the jury to find that Hendrick's general manager's testimony was not credible.

[10]Hendrick's brief in several places misrepresents the testimony of Danny Collins, an employee with the Department of Consumer Affairs. For example, on page 11 of their memorandum, Hendrick implies that the Department of Consumer Affairs would have dismissed Julie Freeman's Complaint in this case alleging that Hendrick charged a closing fee that was not for the purpose of reimbursing closing costs. Collins's testimony, instead, was that he would not

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DENYING HENDRICK'S MOTION FOR JNOV.[11]

There was ample evidence to support the trial court's denial of Hendrick's motion for judgment notwithstanding the verdict and Hendrick's appeal on this ground should be denied.

> When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court. The Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. The motions should be denied when either the evidence yields more than one inference or its inference is in doubt. An appellate court will only reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law.

Gadson ex rel. Gadson v. ECO Servs. of S. Carolina, Inc., 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007).

A. The Evidence, When Construed in the Light Most Favorable to Ms. Freeman, Supports the Jury's Finding that Hendrick Violated the Dealers Act.

The jury found that Hendrick violated the Motor Vehicle Dealers Act,[12] a consumer protection statute, which imposes liability for actions by car dealers that are unfair,[13]

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find anything wrong with a complaint that a person simply "paid a closing fee." [R.p. __, trial transcript, p. 617, l. 9 to 618, l. 3]. Collins's testimony has nothing to do with a complaint that the dealership charged a closing fee that was not meant to reimburse it for closing costs. This Court should reject Hendrick's attempt to confuse issues and hide from the jury's finding in this case that Hendrick unfairly, arbitrarily, and unreasonably charged closing fees in an effort to make a hidden profit under the guise of charging a "PROCUREMENT FEE" and "administration fee."

[11]This section addresses the arguments raised by Hendrick's brief in sections: I, D; I, D, 1; and I, D, 4.

[12] S.C.Code Ann. § 56-15-10 *et. seq.*

[13] S.C.Code Ann. § 56-15-30(a) provides: "(a) Unfair methods of competition and **unfair** or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful." (emphasis added).

arbitrary/unreasonable,[14] or actions which are in bad faith.[15] As discussed below, the evidence submitted at trial was sufficient to support the jury's finding that Hendrick violated the Dealers Act.

The evidence presented at trial showed that from August 29, 2002 to August 29, 2006, Hendrick charged all of its customers closing fees. At trial, by way of stipulation, Ms. Freeman introduced a chart (Plaintiff's Ex. 17) showing that Hendrick uniformly collected $1,445,786 in closing fees from 5,314 car buyers during the relevant time period. [R.p. __]. Julie Freeman was charged a $299 closing fee that Hendrick referred to as an "ADMINISTRATION FEE" on some of her documents and a "PROCUREMENT FEE" on other sales documents from Hendrick. The testimony from Hendrick's 30(b)(6) representative published at trial shows that a closing fee was charged on every vehicle sale. [R.p. __, trial transcript, p. 119, ll. 22-24; p. 121, l. 23 to p. 122, l. 1. and p. 125, ll. 1-3].

Hendrick employees testified that they were trained to instruct customers that the closing fees were being charged to reimburse Hendrick for closing costs such as document preparation and retrieval. [R.p. __, trial transcript, p. 368, ll. 4-11 (salesman's standard explanation of fee); p. 404, ll. 5-18 (F&I manager's standard explanation of fee), p. 405, ll. 9-13 and 17-21].

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[14] "Although arbitrary conduct is not defined in the Dealers Act, our supreme court has defined it for purposes of the Act to include 'acts which are **unreasonable**, capricious or nonrational; not done according to reason or judgment; depending on will alone.'" deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000). (emphasis added).

[15] S.C.Code Ann. § 56-15-40 provides: "(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is **arbitrary**, in **bad faith**, or unconscionable and which causes damage to any of the parties or to the public." (emphasis added).

Similarly, the evidence established that Hendrick posted signs in conspicuous places in the dealership stating that Hendrick was charging closing fees to reimburse itself for the costs of document preparation and document retrieval. <u>See</u> Plaintiff's Ex. 2, sign declaring that Hendrick was charging closing fees to reimburse itself for the costs of document preparation and document retrieval. [R.p.__, trial transcript, pp. 299, ll. 11-22; p. 386, ll. 4-15 and R.p. _, Plaintiff's Exhibit 2]

Testimony was also presented by Hendrick's Vice-President of Transaction Compliance, Randy Watkins, whose duties included monitoring statutes and ensuring that Hendrick complied with them. [R.p. __ trial transcript, p. 301, l. 12 to p. 302, l. 23 and p. 303, ll. 16-23]. Mr. Watkins testified that if Hendrick was going to post signs saying that they were reimbursing themselves for certain overhead costs that Hendrick should know what those costs were <u>before</u> they charged the fee. [R.p. __, trial transcript, p. 305, l. 23 to p. 306, l. 3]. Mr. Watkins also testified that in order to be "<u>fair</u>", a dealer needs to know what their document preparation and retrieval costs are <u>before</u> they seek to reimburse themselves for those costs. [R.p. __, trial transcript, p. 308, l. 21 to p. 309, l. 2]. Mr. Watkins also admitted that it would not be "<u>fair</u>" for a dealer to charge a closing fee that was not tied to their actual closing costs. [R.p. __ trial transcript, p. 309, ll. 3-6].

The evidence at trial, when construed in the light most favorable to Ms. Freeman, was sufficient for a jury to find that Hendrick did not charge its closing fees for the purpose of reimbursing itself for its closing costs including document preparation and retrieval. The evidence showed that Hendrick did not know what its closing costs were when Hendrick set the fee. [R.p. __, trial transcript, p. 126, ll. 9-19, p. 127, ll 1-4]. Similarly, Hendrick admitted at trial that it did not know how the original $199 closing fee was determined and that its subsequent

increases in the amount charged for the closing fee were not tied to increases in Hendrick's costs. [R.p. __, trial transcript, p. 547, ll. 10 to 24; p. 551, l. 13 to p 555, l. 22; p. 561, ll. 4-15; and p. 564, ll. 1-7]. As discussed above, Hendrick's Vice President of Transaction Compliance testified that such actions were unfair and thus the jury reasonably found that the actions were a violation of the Dealers Act because the Act prohibits unfair and unreasonable acts.

The evidence, when construed in the light most favorable to Ms. Freeman was also sufficient for a jury to find that Hendrick's closing fees were not tied to its actual closing costs (Mr. Watkins also admitted that it would be unfair for this to occur and thus this is also a violation of the Dealers Act). The evidence also established that Hendrick's closing fees were not tied to reimbursing Hendrick for its closing costs, Hendrick never calculated its closing costs, and that Hendrick Honda "didn't sit there and do the math" to figure out what costs the closing fee covered before they set the fee. [R.p. __ trial transcript, p. 124, ll. 6-16; p. 125, l. 13 to p. 126, l. 1; p. 126, l. 9 to p. 127, l. 13]. Similarly, Hendrick's expert witness admitted that he did not see anything to suggest that Hendrick did any kind of analysis at the time Hendrick set the closing fee. [R.p. __, trial transcript, p. 763, l. 25 to p. 764, l. 11.]. In other words, Hendrick Honda unfairly and arbitrarily pulled a number out of the air and called it a closing fee in an effort to make a hidden profit under the guise of a statutorily authorized closing fee.

The evidence could also be reasonably construed by the jury to show that Hendrick unreasonably, arbitrarily and unfairly did not use the closing fees as a means to reimburse itself for the costs of closing including document preparation and retrieval as stated on their signs and as their employees were trained to instruct customers. The evidence when construed in the light most favorable to Ms. Freeman showed that Hendrick used the closing fees to increase the amounts paid to senior management. As shown on cross examination of Hendrick's General

Manager, Don Pendleton, the financial statements of Hendrick showed that Hendrick's increase in the amount it charged for closing fees correlated with an increase in the amount of senior management pay. [R.p. trial transcript, p. 564, ll. 8-21; p. 565, ll. 1 to p. 568, l. 7].

The jury, when construing the evidence in the light most favorable to Ms. Freeman, could also have reasonably found that it is unfair, unreasonable, and an action done in bad faith for Hendrick to post signs in their dealership saying that Hendrick is reimbursing the dealership for the costs of document preparation and retrieval and to train their salesmen to tell customers the same, when Hendrick was actually charging the fees to increase management pay or profit.

Similarly, the evidence could have been construed by the jury to show that it is unfair and unreasonable for Hendrick to name the fee on their buyers orders an "ADMINISTRATION FEE" when the fee is not tied to the costs of administering anything and not tied to the costs of document retrieval or document preparation. Hendrick's Vice President of Transaction Compliance testified that use of the name "administrative fee" required that fee be limited to document retrieval and document preparation. [R.p. _, trial transcript, p. 305, ll. 18-22; p. 308, ll. 17-20]. Again, the evidence in this case was sufficient for a jury to find that fees collected by Hendrick were not limited to seeking reimbursement for the costs of document retrieval and document preparation or any closing costs.

The jury could have also reasonably found that it is unfair and unreasonable for Hendrick to name the fee on the contract a "PROCUREMENT FEE" when the fee is not tied to procuring anything. The jury could reasonably find based on the evidence presented that, despite the nomenclature used by Hendrick, Hendrick's fees were really used to pad Hendrick's profit and to

increase senior management pay. The evidence could reasonably be construed to show that the fee collected had nothing to do with closings, administering anything, or procuring anything.

Furthermore, the evidence was sufficient to support a finding by the jury that Hendrick could not claim protection under the Closing Fee Statute, S.C.Code Ann. § 37-2-307. The Closing Fee Statute legalized closing fees only if certain restrictions are complied with. At trial, Ms. Freeman introduced Exhibit 9 wherein the Consumer Advocate, in June 2001, after the Closing Fee statute was enacted, issued an official interpretation that includes a sign that states the purpose for closing fees and provides in part: "THIS DEALERSHIP CHARGES CLOSING FEES AS A MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION." [R.p. __, Plaintiff's Ex. 9]. Similarly, Hendrick's registration forms, which they submitted to the Department of Consumer Affairs in order to be allowed to charge closing fees, state: "This dealership charges closing fees as a means of reimbursing it for certain overhead costs such as documents retrieval and document preparation." [R.p. __, Def. Ex. 3]. The evidence, when construed in the light most favorable to Ms. Freeman could reasonably be construed to show that Hendrick acted unfairly, unreasonably, and in bad faith because they posted the signs, signed the registration form and then did not charge the fees for purposes of reimbursing themselves for closing costs such as document preparation and document retrieval.

Additionally, at trial, Hendrick's General Manager and its Vice President of Transaction Compliance both admitted that they always believed that they were limited under the Closing Fee Statute to charging closing fees that were for the purpose of reimbursing Hendrick for the costs of closing such as document preparation and document retrieval. [R.p. __, Randy Watkins testimony, trial transcript p. 307, ll. 7-24; p. 305, ll. 9-22, p. 303, ll. 2-15; p. 303, l. 16 to p. 304,

l. 1.; and R.p.__, Don Lee Pendleton testimony, trial transcript, p. 467, ll. 8-22; p. 460, ll. 4-14 (relied on consumer affairs interpretation); p. 538, ll. 16-20 (believed limited to reimbursing closing costs).]. The jury could reasonably have found that it is unfair, unreasonable, and an act of bad faith for Hendrick to know of this limitation and then knowlingly ignore the limitation and instead charge closing fees for profit and to pad senior management pay.

As discussed above, the evidence when construed in Ms. Freeman's favor was sufficient to show that Hendrick charged closing fees that were not for the purpose of reimbursing itself for closing costs such as document preparation and document retrieval. Instead, the jury could have reasonably found that Hendrick unfairly, arbitrarily, unreasonably, and in bad faith charged closing fees that were designed to pad management pay and/or increase profit.

As to damages, Hendrick charged an arbitrary, unreasonable, and unfair fee that was not tied to their actual closing costs and was not, as Hendrick certified, charged as a means of reimbursing Hendrick for the costs of document preparation and document retrieval. The fee was illegal because it falls outside the narrow exception provided for in the Closing Fee Statute. It is axiomatic that Hendrick was not allowed to charge closing fees that were not in compliance with the Closing Fee statute which legalized the fees. The jury could easily have found that Ms. Freeman and all the other purchasers were similarly damaged because they paid fees that were held out under color of law as legal closing fees to reimburse closing costs but were instead, and despite the nomenclature used, were charged to pad management pay and increase profit. Hendrick was not authorized to charge such hidden profit fees and the jury could have easily found when all facts are construed in the light most favorable to Ms. Freeman that the damages are the entire amount of the illegal fees.

The totality of aforementioned evidence and testimony, when construed in the light most favorable to Ms. Freeman, was a sufficient basis for the jury to reasonably return the verdict at issue. Accordingly, Hendrick's appeal requesting a judgment notwithstanding the verdict or a new trial should be denied.

II. THE TRIAL COURT'S DEFINITION OF THE TERM "CLOSING FEE" WITHIN S.C.CODE ANN. §37-2-307 WAS CORRECT AND CONSISTENT WITH CONSUMER PROTECTION, THE PURPOSE BEHIND THE STATUTE, THE ADMINSTRATIVE INTERPRETATION AND THE USUAL AND CUSTOMARY MEANING OF THE TERM.[16]

The trial court properly defined a previously undefined term[17] in a statute, the phrase "closing fee" as used in S.C.Code Ann. §37-2-307. "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. " Univ. of S. California v. Moran, 365 S.C. 270, 277-78, 617 S.E.2d 135, 139 (Ct. App. 2005). "[A] statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Carolina Alliance for Fair Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 489-90, 523 S.E.2d 795, 802 (Ct. App. 1999). "Moreover, construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Id.

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[16]This section addresses the arguments raised by Hendrick in sections: I; and I, B (1-4).

[17]Hendrick seems to argue that the trial court erred in defining the previously undefined term "closing fee" in S.C.Code Ann. § 37-2-307. See memo. p. 24. The trial court was correct in issuing the requested declaratory judgment because there was a dispute as to the meaning of the term. In fact, as shown below, Hendrick's lawyers disagree with Hendrick's employees and agents whom testified that Hendrick always believed that the term "closing fee" as used in the statute limited Hendrick to charging fees for purposes of reimbursing closing costs. See chart below.

This Court in reviewing the declaratory judgment at issue "is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 467, 636 S.E.2d 598, 605-06 (2006).

As discussed below, the trial court found that "S.C.Code Ann. § 37-2-307 authorizes the charging of "closing fees" which are for reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation." [R.p. _, Order, p. 10]. This definition is consistent with the usual and customary meaning of the term, the purpose of the statute, and the official administrative interpretation of the Closing Fee Statute. Moreover, this Court should find that this interpretation best comports "with the law and public policies of this state" and what is "justice and right." Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 467, 636 S.E.2d 598, 605-06 (2006).

A. The Trial Court's Declaratory Judgment Interpreting the Closing Fee Statute Was Correct and Consistent with Defendant's Admissions as to What the Usual and Customary Meaning of the Term "Closing Fee" as Well as the Administrative Interpretation.

The Declaratory Judgment at issue in this appeal entered in 2010 and adopted the same interpretation of the Closing Fee Statute that Hedrick's employees and agents had used over the prior 9 years (the usual and customary meaning). The trial court's interpretation is also consistent with the Department of Consumer Affairs official interpretation issued in 2001. There was nothing ground breaking or unfair in the trial court adopting the same interpretation of the Closing Fee Statute that Hendrick's agents and employees and the Department of Consumer Affairs had already adopted. The following chart shows a timeline of relevant events.

YEAR	EVENT	SOURCE
2000-2001	The General Assembly passes the Closing	R.p. __, Plaintiff's Exhibit 9

	Fee Statute. The General Assembly chose the term "Closing Fee", not hidden profit fee.	
6/7/2001	The Department of Consumer Affairs issues the only official interpretation of the statute that includes language for a sign with the following limitation describing what the fee can be charged for: "**THIS DEALERSHIP CHARGES A CLOSING FEE AS A MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION.**"[18]	R.p. ___, Plaintiff's Exhibit 9
Since 2001	Hendrick Honda's Vice President in Charge of Monitoring Regulations and Statutes interprets the closing fee statute as limiting Hendrick to reimbursement of: "**Certain overhead costs associated with document retrieval and document preparation.**"	R.p. __, Randy Watkins testimony, trial transcript p. 307, ll. 7-24; p. 305, ll. 9-22, p. 303, ll. 2-15; p. 303, l. 16 to p. 304, l. 1..
Since 2001	Hendrick Honda's General Manager interprets the Closing Fee statute as limiting them to reimbursement for "**documents in the deal jacket.**"	R.p.__, Don Lee Pendleton testimony, trial transcript, p. 467, ll. 8-22; p. 460, ll. 4-14 (relied on consumer affairs interpretation); p. 538, ll. 16-20 (believed limited to reimbursing closing costs).
Since 6/24/2002	Hendrick Honda filed annual certifications with the Department of Consumer Affairs certifying that it "**charges closing fees as a means of reimbursing it for certain overhead costs such as documents retrieval and document preparation.**"	R.p. ___, Defendant's Exhibit 3
Since 2002	Hendrick Honda trained their salesman to tell the customers the fee was charged to reimburse Hendrick for "**the storage of documents, document preparation, and document retrieval.**"	R.p. __, Randall Clement testimony, p. 368, ll. 4-11 (salesman explanation of fee); p. 404, ll. 13-18; p. 405, ll. 9-21;

[18] This interpretation by the Department of Consumer Affairs regarding S.C. Code Ann. S.C.Code Ann. § 37-2-307 is "valid for the enforcement of the law...." See Heyward v. South Carolina Tax Commn'n, 240 S.C. 347, 126 S.E.2d 15, 19-20 (1962)("[T]he legislature...in enacting a statute...may authorize an administrative agency or board to 'fill up the details' by prescribing rules and regulations for the complete operation of the law...within its expressed general purpose."). The Department of Consumer Affairs' interpretation is consistent with the plain language of § 37-2-307 which allows the charging of "closing fees"- i.e. fees associated with automobile closings "such as document retrieval and document preparation."

2002-2006	Hendrick Honda posts signs in their showroom, business office, finance office, on sales persons' desk, in the hall way, and in the service department waiting room stating the purpose of the fee as follows: "This dealership charges a $299 closing fee **as a means of reimbursing itself for certain overhead costs, such as document retrieval and document preparation**."	R.p. __, Randall Clement testimony, p. 385, l. 22 to p. 386, l. 15; and R.p. __, Plaintiff's Exhibit 2.
2005-2007	Hendrick Honda's Finance Manager has the "understanding that the fee was a **fee that the dealership charges to all customers that are in a retail purchase to recoup the costs for administering paperwork, completing documents, archiving and destroying documents that pertains to a vehicle purchase.**"	R.p.__, Joseph Phillips testimony, p. 629, ll. 15 to 24; p. 654, l. 17 to p. 655, l. 4.
1/11/2010	Judge Early issues a Declaratory Judgment confirming Hendrick's, and the Department of Consumer Affairs official interpretation of the Closing Fee statute. Judge Early's Order provides in part: "I hereby find that **a "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation**."	R.p. ___, Declaratory Judgment Order, p. 11

As shown above, the Declaratory Judgment at issue adopted the same interpretation of the Closing Fee Statute that Hendrick's agents and employees had used for over nine years. This establishes that the trial court adopted the usual and customary meaning of the term.

Furthermore, the language at issue is identical to that used by the Department of Consumer Affairs in its official interpretation issued nine years before the Declaratory Judgment Order. See Plaintiff's Ex. 9, p. 3 included at R.p. __.

The only people arguing for a different interpretation in this case are Hendrick's lawyers because they know Hendrick did not limit itself to reimbursing closing costs when Hendrick set

the amount it would charge as a closing fee.[19] This self-serving lawyer's interpretation is inconsistent with Hendrick's admitted interpretation of the statute, the Department of Consumer Affairs official interpretation, and it should be rejected.

Moreover, this Court should find that the trial court's interpretation of the term "closing fee" as used in the Closing Fee Statute was correct. This term appears twice in the statute, which provides:

> Every motor vehicle dealer charging **closing fees** on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The **closing fee** must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

(emphasis added). The use of the term "closing fees" necessarily involves the reimbursement of the certain costs that are associated with an automobile closing such as document retrieval and document preparation. Nothing in the statute authorizes a dealer to charge hidden profit fees but call the fees names implying the fee is for a service such "ADMINISTRATION FEE" or "PROCUREMENT FEE."

The trial court properly found that "Closing Fee" is a pre-determined set fee for the reimbursement of closing costs such as document retrieval and document preparation. Again, this is consistent with Hendrick's own interpretation and the official interpretation from the Department of Consumer Affairs. Hendrick's vice president testified as follows:

> Q: Well, what would you anticipate telling the jury about the fee collection policy as set forth in Exhibit 13?
>
> A: We are allowed to collect a fee if certain things are satisfied according to the Consumer Affairs Department in the state of South Carolina. These exhibits that you provided to me.

[19] The jury agreed and found that Hendrick did not charge closing fees to reimburse itself for closing costs.

Q: One of those things would have been, have always been, that the fee should be for the reimbursement of document preparation and document retrieval.

A: Yes.

. . .

Q. And those guidelines for reimbursement of document retrieval and document preparation costs have been known by Hendrick Automotive since 2001?

A. I would have to say yes.

[R.p. ___, Watkins testimony, p. 307, ll. 14 to 24].

Hendrick's lawyers contend that there is no limit to the purposes for which closing fees can be charged and that a "Closing Fee" does not have to be for reimbursement of the costs associated with an automobile closing. This is contrary to Hendrick's agents admissions who all repeatedly testified that Hendrick knew the charge was only permissible to reimburse Hendrick's closing costs. See timeline chart above. Hendrick's lawyers should not be permitted to override the admissions made by their client and force a definition of "closing fee" that would render the term "closing" in the Closing Fee Statute meaningless or somehow turn a "closing fee" as used in the statute into a "hidden profit fee." This would undermine the purpose of the statute which is consumer protection.

Hendrick's lawyers' interpretation would render the term "closing" meaningless and should be rejected by this Court. "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992). S.C.Code Ann. §37-2-307 provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

This statute authorizes a motor vehicle dealer to charge "closing fees." The combined use of the words "closing" and "fee," must be given some meaning. *See* Hartford Acc. and Indem. Co. v. Lindsay, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) (full effect must be given to each portion of a statute, and a court should avoid interpretation that renders a portion meaningless).

The trial court properly found that the plain and ordinary meaning of a "closing" in relation to a motor vehicle dealer is an automobile closing which occurs at the time the purchaser fills out the motor vehicle sales contract and other paperwork necessary to complete a purchase. The term "fee" is defined as "[a] charge for labor or services." See Black's Law Dictionary, 7th Ed. 200. In order to give the words "closing fee" meaning in a statute applicable to automobile dealers, a "closing fee" must be a fee charged for labor or services necessary for an automobile closing. This is consistent with the plain language and ordinary meaning of the words in the statute. The statute does not authorize an "arbitrary fee" or a "hidden profit fee." The "closing fee" has to be for the service of closing an automobile transaction if the term is going to have meaning.

The trial court's definition is also in accord with the Department of Consumer Affairs's official interpretation. *See* Lexington Law Firm v. South Carolina Department of Consumer Affairs, 382 S.C. 580, 677 S.E.2d 591 (2009) *quoting* Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221-222(1976)("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."). With respect to § 37-2-307, the Department of Consumer Affairs has only issued one official interpretation. This interpretation was issued in 2001.

The term "closing fee" is not expressly defined in the official interpretation. However, the official interpretation includes language for a disclosure form that complies with S.C.Code

Ann. § 37-2-307's requirement that the charging of closing fees be "displayed in a conspicuous location in the motor vehicle dealership" and this language clearly states the purpose for which closing fees may be charged. [R.p. __, Official Interpretation]. The disclosure provides in part:

> NOTICE- CLOSING FEES
> THIS DEALERSHIP CHARGES CLOSING FEES AS A MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION....

[R.p. __, Id.]. The Department of Consumer Affairs' language in the disclosure supports a conclusion that a "closing fee" must be a fee used "as a means of reimbursing [the dealer] for certain overhead costs such as document retrieval and document preparation."

Additionally, Hendrick's practices support a conclusion that "Closing Fees" are fees charged for the reimbursement of certain overhead costs such as document retrieval and document preparation. Again, Hendrick submitted a registration form to the Department of Consumer Affairs that provides:

> This dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation.

[R.p. __, Defendant's Exhibit 3]. A representative of Defendant Hendrick signed and submitted the registration form in order for Hendrick to be permitted to charge "closing fees" under S.C. Code Ann. §37-2-307. Id.

Similarly, Hendrick posted signs in its dealership that provide:

> THIS DEALERSHIP CHARGES A $299.00 CLOSING FEE AS A MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION.

Notably, this is the same language that was recommended by the Department of Consumer Affairs with the official interpretation. Hendrick was free to craft its own language. Instead,

Hendrick chose to use the recommended language. This leads to the conclusion that Hendrick in practice interprets the term "closing fees" the same way as the Department of Consumer Affairs and the same way as the trial court in the Declaratory Judgment Order. This is also consistent with the sworn testimony of Hendrick's agents referenced in the chart above.

Moreover, Hedrick is a member of the South Carolina Automobile Dealers Association ("SCADA") which has instructed its members to only charge closing fees for the reimbursement of actual cost for the service provided.

> Q: From 1978 to this minute right now, is it still SCADA's position—
>
> . . .
>
> --that this fee, must be reasonable and for a service actually performed?
>
> A: Yes.[20]
>
> Q: Okay. Why would you advise your dealers to make certain that the fee is reasonable for the service provided?
>
> A: Because that's what the Department of Consumer Affairs had said to do.[21]

SCADA's instructions to its members are consistent with the interpretation that "closing fees" are fees charged as a means of reimbursing dealers for closing costs. The Closing Fee Statute simply does not allow a dealer to charge a hidden profit fee as urged by Hendrick's lawyers. This Court should adopt the same meaning as that adopted by the trial court and described by SCADA above: that closing fees are for reimbursement of closing costs. Hendrick's employees' and SCADA's interpretation above show that the usual and customary meaning of the term closing fee is the same as that adopted by the trial court.

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[20] [R.p. ___ Reply to Defendants' Memoranda In Opposition to Plaintiff's Motion Asking The Court to Issue a Declaratory Judgment Interpreting the Statutes Governing This Case Under Rule 57, SCRCP , Ex. C., Rule 30(b)(6) Deposition of SCADA, p. 140, ll. 1-7.

[21] [R.p. __, Id., p. 170, ll. 21-25.

Furthermore, Hendrick's lawyers' interpretation that there is no limit to the purposes for which closing fees can be charged is unreasonable in light of the purpose of the statute. "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the Act was passed may be considered." Greenville Baseball v. Bearden, 20 S.E.2d 813, 815 -816 (S.C. 1942). When S.C.Code Ann. § 37-2-307 was enacted, it was included in the Consumer Protection Code. This indicates that S.C.Code Ann. § 37-2-307 was enacted to protect consumers. Hendrick's lawyer's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Hendrick's lawyer's interpretation, dealers can charge a fee, call it a closing fee, document fee, processing fee (or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit or as in this case to pad management pay. This interpretation would authorize the dealers to charge a fee with a potentially misleading name and would certainly not protect consumers and is unreasonable in light of the statute's intended purpose of protecting consumers.

Hendrick's arguments that the Closing Fee Statute only requires disclosure of a fee that can be for any basis should be rejected. Mere disclosure of a fee that has no relation to its name does not protect consumers. This Court should adopt Hendrick's Vice President of Transaction Compliance's interpretation of the Closing Fee Statute and find that "if a dealership is going to charge a fee and call it by a name that the fee has to be for reimbursement of cost related to that name." [R.p. __, p. 305, ll. 18-22]. This interpretation is correct and comports with the purpose behind the statute which is consumer protection.

The more reasonable interpretation is that S.C.Code Ann. § 37-2-307 authorizes the charging of "closing fees" which are for the reimbursement of certain overhead costs arising

from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual service performed and not a hidden profit center. This interpretation is in accord with Hendrick's signs, Hendrick's registration form, the plain language of the statute, the Department of Consumer Affairs' interpretation, the training given to Hendrick's sales staff in explaining the fee to customers, Hendrick's General Manager's understanding of the statute, Hendrick's Vice President of Transaction Compliance's interpretation of the statute, and SCADA's instructions to its members. The trial court was correct in its interpretation of the Closing Fee statute and the argument that a different meaning than that used by Hendrick in interpreting the Closing Fee statute in its business should be rejected.

B. Hendrick's Arguments About "Retroactive Application" and "Vagueness" Should Be Rejected Because the Testimony Conclusively Establishes That Hendrick Always Knew What the Statute Meant.

Hendrick's arguments about retroactive application, and that the Closing Fee statute is unconstitutionally vague should also be rejected. As discussed above, the Declaratory Judgment Order simply confirmed the understanding of the statute employed by Hendrick from the beginning. Hendrick's Vice President of Transaction Compliance testified that Hendrick always believed that under the Closing Fee statute Hedrick was limited to charging closing fees that were for reimbursement of their closing costs such as document retrieval and document preparation. Similarly, Hendrick posted signs in their dealership to this effect and trained their sales people to tell customers that Hendrick was so limited. Again, the only people arguing that the Closing Fee statute does not limit a dealership to charging closing fees to reimburse a dealer for closing costs are Hendrick's lawyers. The evidence shows that Hendrick always believed they were so limited and thus the statute is not unconstitutionally vague and there is no

unfairness to arising from a declaratory judgment that simply confirmed Hendrick's employees' understanding of the law. As such, Hendrick's arguments as to retroactive application and vagueness should be rejected.[22]

III. THE TRIAL COURT WAS CORRECT IN REJECTING HENDRICK'S ARGUMENTS THAT JULIE FREEMAN'S EXCLUSIVE REMEDY WAS A CAUSE OF ACTION UNDER S.C. CODE ANN. § 37-5-202 IN THE CONSUMER PROTECTION CODE.[23]

The trial court properly held that Julie Freeman could pursue a cause of action under the Dealers Act due to Hendrick committing "unfair" acts in violation of S.C.Code Ann. § 56-15-30 and "arbitrary" acts in violation of S.C.Code Ann. § 56-15-40 (a). Hendrick's arguments that Julie Freeman must pursue a cause of action under S.C. Code Ann. §37-5-202 because the Closing Fee Statute is also in the Consumer Protection Code was legally incorrect and properly rejected.

A. S.C.Code Ann. §§ 37-5-202 (2), (3), and (8) Do Not Apply to Julie Freeman's Transaction and Thus These Statutes Cannot Be Her Exclusive Remedy for Challenging Unfair, Unreasonable and Arbitrary Closing Fee Charges.

The statutory subsections[24] cited by Hendrick as the allegedly "exclusive remedy" for challenging unfair and arbitrary closing fees only apply to transactions involving loans and lenders. S.C.Code Ann. § 37-5-202 (2), (3), and (8) have no application to Julie Freeman's transaction with Hendrick because she did not borrow any money from Hendrick. The statutory subsections at issue are quoted below:

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[22] The fact that the jury in the Ritz case returned a defense verdict does not in any way indicate that the Closing Fee statute is vague. The facts in the Ritz case were different than those in this trial.

[23] This section addresses the arguments raised in Hendrick's brief sections: I, A (1-3).

[24] See page 15 of Hendrick's memoranda provides in part: "Remedies for violations of the [Closing Fee] Statute are provided in Chapter 5 of the Consumer Code, and include recovery of actual damages, statutory penalties, and attorneys fees. See S.C.Code Ann. § 37-5-202 (2), (3), and (8).

> (2) A **consumer** is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid. A refund may not be made by reducing the consumer's obligation by the amount of the excess charge, unless the **creditor** has notified the consumer that the consumer may request a refund and the consumer has not so requested within 30 days thereafter. If the consumer has paid an amount in excess of the lawful obligation under the agreement, the consumer may recover the excess amount from the person who made the excess charge or from an assignee of that person's rights who undertakes direct collection of payments from or enforcement of rights against consumers **arising from the debt**.
>
> (3) If **a creditor** has contracted for or received a charge in excess of that allowed by this title, or **if a consumer** is entitled to a refund and a person liable to the consumer refuses to make a refund within a reasonable time after demand, the consumer may recover from the creditor or the person liable in an action other than a class action a penalty in an amount determined by the court not less than $100 nor more than $1,000. With respect to excess charges arising from sales or loans made pursuant to a revolving charge or revolving loan account, no action pursuant to this subsection may be brought more than two years after the violation or passage of a reasonable time for refund occurs. With respect to excess charges arising from other consumer credit transactions no action pursuant to this subsection may be brought more than one year after the scheduled or accelerated maturity of the debt. For purposes of this subsection, a reasonable time is presumed to be 30 days.
>
> (8) In an action in which it is found that a **creditor** has violated this title, the court shall award to the **consumer** the costs of the action and to his attorneys their reasonable fees. In determining attorney's fees, the amount of the recovery on behalf of the consumer is not controlling.

S.C.Code Ann. § 37-5-202 (2), (3), and (8) (emphasis added). The term "consumer" as used in this statute only involves borrowers and lending transactions. The definition of this term is included below:

> (10) "Consumer" means the buyer, lessee, or debtor to whom credit is extended in a consumer credit transaction. In addition, for purposes of Chapters 10, 11, 13, and 15 of this title, as well as Sections 37-5-108, 37-6-108, 37-6-117(i), and 37-6-.118, the term also includes:
> (1) a natural person who is a purchaser or lessee or prospective purchaser or lessee in any transaction arising out of the production, promotion, sale, or lease of consumer goods or services; or
> (2) a natural person who is the object of a solicitation or offer relating to a contest, game, or prize offer subject to Chapter 15.

S.C.Code Ann. § 37-1-301. Hendrick's lawyers incorrectly and misleadingly cite the above statute at page 22 of its brief, which provides:

> There is no question that Hair is a "consumer" under the Consumer Code. See § 37-1-301(10)(1) (defining a consumer as 'a natural person who is a purchaser...in any transaction arising out of the...sale...of consumer goods.').

Hendrick's lawyers failed to point out that § 37-1-301(10)(1) only applies to Chapters 10, 11, 13, and 15 of the Consumer Protection Code, as well as Sections 37-5-108, 37-6-108, 37-6-117(i), and 37-6-118. This definition does not apply to Chapter 5 and § 37-5-202. Accordingly, the citation by Hendrick is plainly wrong here.

More importantly, Julie Freeman is not a consumer as referenced in § 37-5-202 and thus this statute as a matter of law cannot be her exclusive remedy. Julie Freeman was never extended any credit by Hendrick and Hendrick was never her lender. See R.p. __, Randall Clement testimony, p. 378, ll. 16-20 ("Credit application was not applicable in this case. She provided her own—arranged her own financing. Credit report we didn't need in this case. Bank approval we didn't need in this case because she got her own financing."). Because Julie Freeman did not borrow money from Hendrick, S.C.Code Ann. § 37-5-202 has no application to her transaction and Hendrick's arguments that this statute somehow constitutes her exclusive remedy for challenging unfair and arbitrary closing fees should be rejected.

Julie Freeman and all car buyers are entitled to challenge unfair, arbitrary and unreasonable practices under the Dealers Act. Nothing in S.C.Code Ann. § 37-5-202, which only applies to consumer loans, takes away car purchasers' rights and remedies under the Dealers Act to challenge unfair, unreasonable and arbitrary acts by car dealers such as the closing fee practices of Hendrick. Hendrick's arguments that Julie Freeman's exclusive remedy

lies in § 37-5-202 should be rejected. Again, this statute in no way applies to Ms. Freeman and thus cannot be her exclusive remedy.

B. Defendant's argument that § 37-5-202 is Julie Freeman's Exclusive Remedy is contrary to the holding in Tilley v. Pacesetter

Even if § 37-5-202 did apply to Julie Freeman's transaction, which it does not, this Court has previously held that this statute does not create an exclusive remedy. This Court in Tilley v. Pacesetter Corp. 333 S.C. 33, 40-41, 508 S.E.2d 16, 19-20 (1998) held that S.C.Code Ann. § 37-5-202, the statute relied upon by Hendrick, does not create an exclusive remedy. The Tilley opinion provides in part:

> Pacesetter contends that, in providing a specific remedy in 37-5-202 for violations of section 37-2-413, the legislature intended 5-202 as the exclusive remedy. We disagree. **Had the Legislature so intended, it could have specifically provided that 37-5-202 was the exclusive remedy.** Accord Hanier v. American Medical International, 328 S.C. 128, 492 S.E.2d 103 (1997) (if legislature had intended certain result in a statute, it would have said so).

This Court should apply the holding from Tilley here and reject Hendrick's contention that S.C.Code Ann. § 37-5-202 creates an exclusive remedy. S.C.Code Ann. § 37-5-202 does not specifically provide that it creates an exclusive remedy. Under the holding in Tilley, this statute should not be construed as an exclusive remedy for consumers when charged an unfair, unreasonable or arbitrary closing fee. The Dealers Act provides these protections and that is the claim prosecuted by Julie Freeman in this case.[25]

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[25] Moreover, S.C.Code Ann. § 37-5-202, while specifically referring to other statutes, makes no reference to the Closing Fee Statute, § 37-2-307, and the Closing Fee Statute makes no reference to S.C.Code Ann. § 37-5-202. Similarly, S.C.Code Ann. § 37-5-202 makes no reference to closing fees and expresses no intention to be the exclusive remedy for car buyers who are charged illegal closing fees. This also indicates that S.C.Code Ann. § 37-5-202 was not intended as an exclusive remedy for car buyers when challenging closing fees. As the Court in Tilley noted, had the legislature wanted to make S.C.Code Ann. § 37-5-202 an exclusive remedy "it would have said so."

C. ***The rules of statutory construction support a finding that a car buyer, like Julie Freeman, can pursue a claim under the Dealers Act when charged a closing fee that also violates the Closing Fee statute.***

The Closing Fee Statute and the Dealers Act's prohibitions against unfair, unreasonable, and arbitrary acts can be read together so that both are operative.

> **Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative**. Id. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would ... expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." Justice v. Pantry, 330 S.C. 37, 43–44, 496 S.E.2d 871, 874 (Ct.App.1998) (quoting State v. Hood, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

Hodges v. Rainey, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000).

In this case, the Closing Fee Statute, § 37-2-307, and the Dealers Act both regulate conduct between car dealers and car purchasers[26] and importantly it is **possible** to render both the Closing Fee Statute and the Dealers Act operative. The Closing Fee Statute legalizes closing fees only if certain strict limitations are followed. The Dealers Act prohibits unfair, arbitrary and unreasonable actions. If a car dealer charges a closing fee that is outside the protections of the Closing Fee Statute that action is also unfair, arbitrary and unreasonable and, as such, that fee is also subject to challenge under the Dealers Act. This is the precise scenario involved here. Both

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[26] The Dealers Act is designed to protect consumers from an assortment of unfair acts by unscrupulous car dealers. The Act's prohibition against unfair acts is broad and not limited to just closing fees. The fact that the Dealers Act does not mention closing fees does not mean that unfair closing fees are immune from challenge. Similarly, the Dealers Act does not mention selling cars without promised promotional materials and such sales are subject to challenge under the Dealers Act. *See e.g.* deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 264-65, 536 S.E.2d 399, 404-05 (Ct. App. 2000) (falsely representing that she would receive promotional materials). The Dealers Act also does not mention bait and switch schemes which similarly would undisputedly be subject to challenge under the Act. Hendrick's arguments that because the Dealers Act does not expressly mention closing fees that unfair closing fees are immune from challenge under the Dealers Act should be rejected because it is inconsistent with the liberal construction to be given this remedial statute.

statutes are operative. Neither statute is rendered inoperative. Thus, pursuant to the foregoing authority, this construction trumps Hendrick's proposed interpretation which would act to exclude illegal closing fees from the Dealers Act's prohibition against unfair and unreasonable conduct, as well as actions done bad faith and thus render the Dealers Act's consumer protections inoperative.

Moreover, there is no "apparent conflict" between the Closing Fee Statute and the Dealers Act. The Closing Fee statute simply creates a narrow exception that allows closing fees to be charged if a dealer follows certain limitations. The Dealers Act prohibits "unfair," "arbitrary," "unconscionable" and actions "in bad faith." These two statutes are not in conflict and more importantly as mentioned above it is **"possible"** to construe these statues "to allow both to stand and to give effect to each." See Hodges v. Rainey, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000). As such, this is the more reasonable interpretation.

Furthermore, Hendrick's interpretation is contrary to the liberal construction in favor of consumer protection that is to be used when evaluating claims under the Dealers Act. *See* Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (S.C. Ct. App. 2002) ("This action is based not on a common law tort or on contract but is a creature of statute. The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose."); Herron v. Century BMW, 387 S.C. 525, 535, 693 S.E.2d 394, 399 (2010) cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872, 179 L. Ed. 2d 1184 (U.S.S.C. 2011) and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011). ("The purpose of the Dealers Act is consumer protection."). Hendrick's argument that the Dealers Act provides no protection to consumers from unfair, unreasonable and illegal closing fees is

contrary to the liberal rule of construction to be used when evaluating claims under the Dealers Act and should be rejected.

Additionally, the Consumer Protection Code is designed to supplement consumer's rights at law and not to take consumer rights away. Hendrick wrongly argues the Consumer Protection Code was intended to be the exclusive statute governing the subjects addressed in the Code and thus the enactment of the Closing Fee Statute eliminates all consumers' ability to challenge a closing fee as an unfair, unreasonable and bad faith act in violation of the Dealers Act. This argument is contrary to S.C.Code Ann. § 37-1-103, a statute included in the Consumer Protection Code, which provides:

§37-1-103. Supplementary general principles of law applicable.

> Unless displaced by the particular provisions of this title, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

S.C.Code Ann. § 37-1-103. As shown above, the Consumer Protection Code includes a subsection clarifying that the act is intended to supplement other principles of law. In this case, the other principle of law at issue is the Dealers Act and there is nothing in the Consumer Protection Code that indicates an intention to repeal the protections provided to consumers in the Dealers Act. Thus, Hendrick's argument that the Consumer Protection Code takes away protections given to consumers in the Dealers Act should be rejected. The Consumer Protection Code supplements those remedies; it does not take away protections otherwise available at law to consumers.

Furthermore, Hendrick's proffered interpretation that the enactment of the Closing Fee Statute creates an exclusive remedy for consumers for challenging closing fees and takes away

the pre-existing remedy provided in the Dealers Act to challenge unfair, unreasonable and bad faith acts by car dealers is contrary to the purposes of both the Dealers Act and the Consumer Protection Code and should be rejected. See Tilley v. Pacesetter Corp., 355 S.C. 361, 378, 585 S.E.2d 292, 300 (2003) ("The Consumer Protection Code and the Dealers Act share a common purpose: protection of the consumer."). These statutes are designed to protect consumers and should be interpreted liberally to accomplish this purpose. Hendrick's argument that the enactment of the Closing Fee statute was designed to take away pre-existing remedies for consumers does not protect consumers and thus should be rejected as contrary to the purposes behind the Dealers Act and the Consumer Protection Code.[27]

D. *The Enactment of the Closing Fee Statute Did Not Displace the Provisions Designed to Protect Consumers included in the Dealers Act.*

[27] Hendrick wrongly argues that "the Dealers Act is not applicable, and it governs only 'written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer.'" See Hendrick's brief fn. 9. This argument should be rejected for several reasons. First, our courts have repeatedly applied the Dealers Act to consumer contracts. *See e.g.* deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 264-65, 536 S.E.2d 399, 404-05 (S.C.App. 2000) (holding question of fact existed as to whether dealer violated the Dealers Act by failing to fulfill contractual obligations in the sale of an automobile to a consumer); *See also* Jackson v. Speed, 326 S.C. 289, 304, 486 S.E.2d 750, 757-58 (1997) (holding the jury could reasonably find a dealer violated the dealers act "by failing to repair the vehicle as agreed to in the contract."). Second, the Dealers Act contains provisions that specifically refer to contracts between consumers and car dealers and thus it is obvious that the legislature intended the Act to apply to contracts between consumers and dealers. See e.g. S.C.Code Ann. § 56-15-40(5)(a). Third, the statute cited by Defendant, S.C.Code Ann. § 56-15-80, only clarifies that the Dealers Act applies to contracts between manufacturers and dealers. The statute does not in any way state the Dealers Act does not apply to consumer contracts. Last, Defendant's argument that the Dealers Act does not apply to contracts between consumers and car dealers is contrary to the purpose behind the Dealers Act ("consumer protection") and thus the argument should be rejected. It would be nonsensical to say that the purpose behind the Dealers Act is consumer protection and then accept Hendrick's argument that the Dealers Act does not apply to contracts between consumers and car dealers.

Similarly, Hendrick's argument, relying on Hitachi Electronic Devices (USA), Inc. v. Platinum Technologies, Inc., 366 S.C. 163, 170-171, 621 S.E.2d 38, 41 (2005), that the enactment of the Closing Fee Statute displaced the protections provided to consumers in the Dealers Act should be rejected. The Hitachi court stated that: "[d]isplacement occurs when one or more particular provisions of the UCC comprehensively address a particular subject." In Hitachi, the Court analyzed a claim for breach of warranty and after noting that the UCC provided a "comprehensive system of remedies" for breach of warranty held that the plaintiff there could pursue no other remedy. *See* Id. at 170-171 ("This comprehensive system of remedies for breach of warranty displaces the common law. Consequently, the Buyer cannot pursue common-law remedies for the Seller's alleged breach of warranty."). Here, the Closing Fee Statute does not reference a remedy and expresses no intention to set forth a comprehensive system of remedies. Moreover, the only remedy cited by Hendrick, as discussed above, has no application to Julie Freeman's transaction because she did not borrow money from Hendrick. There simply is no "comprehensive system of remedies" at issue and thus the Hitachi case does not apply.

More importantly, the Department of Consumer Affairs, who is charged with enforcing the Consumer Protection Code, in its official interpretation of the Closing Fee Statute stated that it did not find that the Closing Fee statute was intended to be a comprehensive remedy. The Official interpretation specifically notes that Closing Fees still may be challenged on other grounds and states:

> The Supreme Court specifically indicated in its holding in *Fanning* that it did not imply such fees might not be actionable under other applicable law. 322 S.C. at 404, 472 S.E.2d at 245, n.8. Likewise, the General Assembly did not further clarify the issue other than to indicate the fees might be legally charged for Consumer Protection Code purposes if the requisite filing and disclosures are

> made. The Department is aware of nothing in the General Assembly's enactment that legitimizes a closing fee or any fee or charge if it is assessed through fraud or misrepresentation.

The Department of Consumer Affairs, whose interpretation should be given weight in interpreting a statute, is correct. See Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."). Nothing in the General Assembly's enactment indicates an intention to set up a comprehensive system of remedies governing closing fees. Accordingly, unlike the enactment of the UCC breach of warranty remedies at issue in Hitachi, the Closing Fee statute does not displace other laws including the Dealers Act. As such, this Court should find that Closing Fees may still be challenged under other laws despite the enactment of the Closing Fee Statute and reject Hendrick's arguments based on Hitachi.

Also, the Closing Fee Statute did not create a new right or liability where none existed before and thus Defendant's argument that the enactment of the Closing Fee Statute means that S.C.Code Ann. § 37-5-202 is an exclusive remedy for challenging Closing Fees should be rejected. The South Carolina Supreme Court in Petition of State ex rel. Hutchinson, 182 S.C. 369, 189 S.E. 475, 477 (1937) stated:

> It has generally been held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive unless the statute clearly shows a contrary intention. Such an exclusion, however, depends upon the creation of a new right.
>
> In 1 C.J.S., Actions, § 6, p. 976, it is said: "Where a statute prescribing a remedy does not create a new right or liability, but merely provides a new remedy for an independent right or liability already existing, the general rule is that the remedy thus given is not regarded as exclusive but as merely cumulative of other existing remedies, and does not take away a pre-existing remedy, or, as more specifically stated, **if a statute gives a new remedy in the affirmative, and contains no negative, express or implied, of the old remedy, the new remedy is merely cumulative; and, in such a case, the party having the right may**

resort to either the pre-existing or the new remedy, except that he cannot resort to inconsistent remedies. * * *" Also see 1 Am.Jur., Actions, § 12.

(emphasis added).

In this case, the enactment of the Closing Fee Statute in 2000 did not create a new remedy where none existed before. Importantly, the South Carolina Supreme Court in Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 404, 472 S.E.2d 242, 245 (1996) specifically noted that closing fees could be the subject of claims "such as claims for fraud, misrepresentation or unfair trade practices." See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 404, , n. 8, 472 S.E.2d 242, 245, n. 8 (1996) ("By our holding, we do not imply that inclusion of such fees may not be attacked on other grounds, such as claims for fraud, misrepresentation or unfair trade practices."). Additionally, the Supreme Court in Ferguson specifically analyzed a claim that a closing fee violated the Dealers Act. See also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 561, 564 S.E.2d 94, 96 (2002) (Ferguson was filed in 1997). As the Fanning and Ferguson courts make clear, closing fees could be challenged as an unfair trade practice and violations of the Dealers Act before the Closing Fee Statute was passed. Thus, under Hutchinson because the Closing Fee Statute does not contain a "negative, express or implied, of the old remedy," the remedies provided in the Consumer Protection Code should be considered cumulative and a victim of unfair closing fees "may resort to either the pre-existing or the new remedy." The Department of Consumer Affairs adopted this same position in its official interpretation.

Furthermore, the following sentence from Hutchinson is another reason why that rule does not apply here: "It has generally been held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive **unless the statute clearly shows a contrary intention.**" As discussed above, the Consumer Protection in S.C.Code Ann. § 37-1-103

expresses an intention that its enactments are designed to supplement consumer rights and not to take them away. Accordingly, Hendrick's arguments that S.C.Code Ann. §37-5-202 is an exclusive remedy for challenging illegal closing fees should be rejected.

IV. THE TRIAL COURT PROPERLY FOUND THAT THE FILED RATE DOCTRINE DID APPLY.[28]

The Filed Rate Doctrine "stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." Temporary Services, Inc. v. American Intern. Group, Inc., 388 S.C. 348, 351, 697 S.E.2d 527, 529 (2010) ("The DOI was not vested with the authority to determine the rates applicable to the workers' compensation policies at issue, thus the Filed Rate Doctrine does not bar Plaintiffs' claims in this instance."); Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517-18, 623 S.E.2d 387, 391 (2005) ("The filed rate doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency."). In this case, the Department of Consumer Affairs does not determine the rates that dealers may permissibly charge as closing fees. This is because the Department cannot look at dealers' records and works through a complaint process, not a monitoring process. [R.p. __ trial transcript, p. 619, l. 12 to p. 620, l. 16]. Instead, the Department relies on the representation by the dealers, including Hendrick, on the registration form that:

> This dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation.

By accepting this representation from Hendrick, the Department is in no way approving a fee that is not being used as a means to reimburse the dealership for closing costs. The jury found

[28]This subsection addresses arguments raised in Hendrick's brief section: I, C.

that Hendrick did not charge the closing fees "as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation." Accordingly, the Filed Rate doctrine simply has no application to the facts at issue because the rate on file by Hendrick was for the limited purpose of reimbursing closing costs. Here, Hendrick did not charge a closing fee to reimburse its closing costs. Thus, the refusal to apply the filed rate doctrine was correct and does not warrant the grant of a new trial.[29]

V. THE TRIAL COURT WAS CORRECT IN RULING THAT MS. FREEMAN MAY REPRESENT ALL OTHER CAR PURCHASERS WHO PAID CLOSING FEES TO HENDRICK UNDER S.C.CODE ANN. § 56-15-110(2).[30]

A. Ms. Freeman Was Not Required to Bring this Case Under Rule 23, SCRCP And Instead Properly Brought this Case Pursuant to the Alternative Included in S.C.Code Ann. § 56-15-110(2).

Hendrick's arguments based on Rule 23, SCRCP do not warrant the granting of a new trial. Hendrick wrongly argues that Ms. Freeman cannot bring this action on behalf of a group because Ms. Freeman failed to plead the elements of a class action under Rule 23, SCRCP. As discussed in detail below, Ms. Freeman had the option to use Rule 23, or S.C.Code Ann. § 56-15-110(2) which specifically allows Ms. Freeman to prosecute this action on behalf of a group. Ms. Freeman chose to prosecute this case on behalf of a group as expressly authorized under the Dealers Act.

The South Carolina General Assembly specifically provided that Ms. Freeman can bring these claims on behalf of a group in S.C. Ann. § 56-15-110. This statute provides:

S.C. Code Ann. § 56-15-110 Suits for Damages.

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of

[29]The filed rate doctrine is never mentioned in the entire trial transcript. As such, this argument likely was not preserved. Regardless, it does not apply for the reasons set forth herein.

[30]This section addresses arguments raised in Hendrick's brief sections: II.

anything by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damage by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) **When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.**

(3) In an action for money damages, if the jury finds that the Defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C.16).

S.C.Code Ann. § 56-15-110 (emphasis added). This statute creates substantive rights in favor of those affected by violations of the Dealers Act and is a remedial statute that should be construed liberally. "This action is based not on a common law tort or on contract but is a creature of statute. The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose." Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (S.C. Ct. App. 2002).

1. S.C.Code Ann. § 56-15-110 (2) Is and Always Has Been an Alternative To the General Class Action Procedure In South Carolina.

Significantly, S.C.Code Ann. § 56-15-110(2), existed at the same time as the old class action statute, S.C.Code Ann. § 15-5-50, that was replaced with Rule 23, SCRCP in 1985. Prior to 1985, these statutes existed as alternative mechanisms for seeking group relief. The old class action statute provided:

> When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Premium Inv. Corp. v. Green, 283 S.C. 464, 471, n. 1, 324 S.E.2d 72, 76, n. 1 (Ct. App. 1984) (quoting the statute). The Dealers Act, which existed simultaneously with the above old class action statute, provides in part:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.

S.C. Code Ann. § 56-15-110(2). The fact that both statutes existed independently is definitive proof that the statutes were alternative avenues for group relief and that this was the intent of the General Assembly.

Importantly, the General Assembly chose to repeal S.C.Code Ann. § 15-5-50 (the class action statute that was replaced with Rule 23) (repealed 1985), but chose not to repeal subsection two of S.C.Code Ann. § 56-15-110. The fact that S.C.Code Ann. § 56-15-110(2) was not specifically repealed supports a finding that the General Assembly intended to provide those harmed by violations of the Dealers Act a broader protection than that protection provided under the general class action statute or its successor Rule 23, SCRCP. *See* Justice v. Pantry, 330 S.C. 37, 43, 496 S.E.2d 871, 874 (Ct. App. 1998) aff'd as modified sub nom. Justice v. The Pantry, 335 S.C. 572, 518 S.E.2d 40 (1999) ("It is presumed that the Legislature [is] familiar with prior legislation, and that if it intend[s] to repeal existing laws it would ... expressly [do] so...).

Quite simply, the Dealers Act provided an alternative method to prosecuting an action on behalf of a group to a class action when the old class action statute was in effect. The old statute was replaced with Rule 23, SCRCP. The Dealers Act was not repealed like the old class action

statute. As such, § 56-15-110(2) still provides an alternative method to prosecuting a claim on behalf of a group to the general class action mechanism now contained in Rule 23, SCRCP. The only change was that Rule 23, SCRCP replaced the old general class action statute; S.C.Code Ann. § 15-5-50.

2. ***S.C. Code Ann. 56-15-110(2) was not repealed by implication.***

The 1985 Act did not impliedly repeal S.C.Code Ann. § 56-15-110(2).

> Under Section 3 of the of the 1985 Act, the Legislature provided that in the event of conflict, the Rules replace existing procedural statutes. However, **repeal by implication is disfavored and requires a showing of conflict between the two competing statutes, incapable of reasonable reconciliation.** Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them.

Blyth v. Marcus, 322 S.C. 150, 153, 470 S.E.2d 389, 391 (Ct.App. 1996) (emphasis added).

Rule 23, SCRCP is not in conflict with S.C.Code Ann. § 56-15-110(2). The rules of statutory construction compel a result that S.C.Code Ann. § 56-15-110(2) is an alternative method to seeking group relief in addition to Rule 23, SCRCP. "Courts should be slow to hold that a statute has been repealed by implication and should avoid holding if it can be done on any reasonable hypothesis and can arrive at another result by any construction which is fair and reasonable." Lewis v. Gaddy, 254 S.C. 66, 76, 173 S.E. S.E.2d 376, 381 (1970). "[T]he repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both stand, the Court will so construe them." City of Rock Hill v. SCDHEC, 302 S.C. 161, 167-168, 394 S.E.2d 327, 331 (1990), *citing* Pearson v. Mills Manufacturing Co., 82 S.C. 506, 509, 64 S.E. 407 (1909). "[T]o effect an implied repeal of one statute by another, they must both relate to the same subject, and

cover the same situations, since one statute is not repugnant to another unless there is such a relation." McCollum v. Snipes, et al., 213 S.C. 254, 268, 49 S.E.2d 12, 17-18 (1948). "It is presumed that the Legislature [is] familiar with prior legislation, and that if it intend[s] to repeal existing laws it would...expressly [do] so; hence, **if by any fair or liberal construction two acts may be made to harmonize, no [c]ourt is justified in deciding that the last repealed the first**." Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct.App. 1999) (emphasis added); State v. Hood, et al., 181 S.C. 488, 491, 188 S.E. 134, 136 (1936).

There is no clear conflict or repugnancy between Rule 23, SCRCP and S.C.Code Ann. § 56-15-110(2). Rule 23, SCRCP and S.C.Code Ann. § 56-15-110(2) cover different situations and are reasonably reconcilable. Rule 23, SCRCP is a general procedural rule that can apply to a wide variety of cases– any case satisfying the elements of Rule 23, SCRCP. S.C.Code Ann. § 56-15-110(2) is a substantive right and only applies to specific claims (violations of the Dealers Act.).

The Dealers Act provides a statutory right to a specific group of consumers different than the general procedural avenue provided in Rule 23, SCRCP. Under the Dealers Act, a plaintiff need to only show one of two things in order to be able to bring the suit on behalf of a group. S.C.Code Ann. § 56-15-110(2) provides:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.

S.C.Code Ann. § 56-15-110(2). Under the statute, Ms. Freeman may bring the suit on behalf of a group if: (1) the suit is of common or general interest to many persons; or (2) the parties are numerous and it is impractical to bring them before the Court. In comparison, Rule 23, SCRCP

has five elements that must be met in order to have a class action under Court rules. The five elements under Rule 23, SCRCP are: (1) numerosity; (2) commonality; (3) typicality; (4) adequately protect the interests of class; and (5) the amount in controversy exceeds $100.00. Notably, the claims at issue satisfy both Rule 23, SCRPC and S.C.Code Ann. § 56-15-110(2).

As can be shown by comparing the requirements of both, the Dealers Act gives a statutory right as compared to the alternative path provided in the general class action rule. This is consistent with the purposes behind the Dealers Act. *See* Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (S.C. Ct. App. 2002)("The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose.").

Rule 23, SCRCP and the Dealers Act are not in conflict and certainly with the mandatory "liberal construction" to be used in this analysis can be construed so that both provisions may stand; the Dealers Act only applies to Dealer Act violations and Rule 23, SCRCP applies to general claims. Accordingly, Hendrick's argument that S.C.Code Ann. § 56-15-110(2) was impliedly repealed should be rejected.

3. The Rules of Statutory Construction Require that the Language in § 56-15-110(2) Be Given Meaning.

Hendrick's argument that even if S.C.Code Ann. § 56-15-110(2) was not repealed that Ms. Freeman was nonetheless still required to plead the elements of Rule 23, SCRCP also fails. This argument would render S.C.Code Ann. § 56-15-110(2) meaningless. "Such an interpretation violates the rule that we should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services, 357 S.C. 327, 342, 592 S.E.2d

335, 343 (Ct.App. 2004). A violation of the Dealers Act just like any other cause of action is always susceptible to being brought as a class action if under court rule. However, the Dealers Act eliminates the necessity of a court rule to bring a group action and instead provides such by a statutory right. Under Hendrick's interpretation S.C.Code Ann. § 56-15-110(2) is meaningless because Ms. Freeman could always bring the claims under Rule 23, SCRCP. Therefore, Hendrick's interpretation should be rejected.

This argument by Hendrick is simply another attempt to argue that S.C.Code Ann. § 56-15-110(2) was repealed by implication. It was not. Again, prior to 1985, there existed two mechanisms for seeking group relief: the general class action statute, S.C.Code Ann. § 15-5-50, and the specific limited group action under the Dealers Act, § 56-15-110(2). After 1985, Rule 23, SCRCP provides the general mechanism and the specific mechanism for Dealers Act claims is still in our Code of Laws. If both statutes existed as alternatives prior to 1985 and one gives plain meaning to S.C.Code Ann. § 56-15-110(2) today, then this statute must still be an alternative to Rule 23, SCRCP. Any other interpretation would render S.C.Code Ann. § 56-15-110(2) meaningless and must be rejected.

Similarly, Hendrick's arguments that Rule 1, SCRCP dictates that only the Rules of Civil Procedure can impact procedure in this State is incorrect. See p. 48, of Hendrick's memo. "A rule of civil procedure may not limit the provisions of a statute. *See* S.C. Const., art. V, § 4 (2009) ("*Subject to the statutory law,* the Supreme Court shall make rules governing the practice and procedure in all such courts.")." Marichris, LLC v. Derrick, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009). S.C.Code Ann. § 56-15-110(2) was not impliedly repealed by the Rules of Civil Procedure, and Rule 1, SCRCP does not override the statutory protection given to

consumers allowing them to sue for the benefit of the whole when the elements of §56-15-110(2) are met. Arguments to the contrary should be rejected.

4. ***The Claims At Issue Satisfy the Requirement Included in S.C.Code Ann. § 56-15-110 (2).***

The plain language of this statute provides that Ms. Freeman can bring this lawsuit in the manner in which she did. "Where the terms of the relevant statute are clear, there is no room for construction." Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995). Under this statute, one may sue for the benefit of the whole in two scenarios:

1. If the "action is one of common or general interest to many persons"; **or**

2. The "parties are numerous and it is impracticable to bring them all before the court."

S.C.Code Ann. § 56-15-110(2). This lawsuit is proper under either scenario.

First, the lawsuit is of common or general interest to many persons because Hendrick uniformly collected closing fees that were not for the reimbursement of their closing costs from every single customer from August 29, 2002 to August 29, 2006. See Plaintiff's Ex, 17, stipulated chart showing that Hendrick uniformly collected closing fees in the amount of $1,445,786 from 5,314 car buyers. [R.p. _]. The closing fee was charged on every deal. [R.p. __, trial transcript, p. 119, ll. 22-24; p. 121, l. 23 to p. 122, l. 1. and p. 125, ll. 1-3]. Additionally, the evidence showed that it was undisputed that Hendrick's closing fee was not tied to its actual closing costs and that Hendrick did not do the math to insure that the closing fee charged was for reimbursement of their actual closing costs. Importantly, the jury's verdict definitively shows that all transactions were the same because the jury returned the entire amount of the closing fee collected for every purchaser. If the jury had believed argument from defense counsel that all

transactions were different, the jury would not have reached a verdict returning the entire amount from every transaction to the affected customers. Hendrick's arguments on commonality were presented to the jury and properly rejected.

Second, the parties are numerous and it would be impractical to for 5,314 car buyers who paid illegally charged closing fees to pursue their cases individually. Notably, the Defendant does not contest and appears to concede that the lawsuit on behalf of 5,314 car buyers would result in numerous parties and it would be impracticable to bring them all before the court. As such, this lawsuit is expressly authorized by the General Assembly and proper under either scenario set forth in S.C.Code Ann. § 56-15-110(2).

This action is brought pursuant to express statutory authority in S.C.Code Ann. § 56-15-110(2). Significantly, this is <u>not</u> a Rule 23, SCRCP class action. The Dealers Act provides a substantive right to bring a group suit in the manner which Ms. Freeman is prosecuting this case and Ms. Freeman satisfied all elements included in § 56-15-110(2). Thus, the trial court's determination to allow her to prosecute the claim under this statute was correct.

B. Hendrick's and the Absent Car Purchasers' Due Process Rights Were Protected

Hendrick's arguments asserting a due process violation arising from allowing Ms. Freeman to prosecute this case on behalf of a group pursuant to the express language in § 56-15-110(2) should be rejected. Hendrick's due process rights were protected. First, the lawsuit involves common claims on behalf of a large number of purchasers. All of the 5,000 plus customers were uniformly charged a closing fee that the jury found was not tied to the reimbursement of Hendrick's closing costs. Second, the testimony showed that Ms. Freeman's claim was typical of every other customer's claim because she was charged a closing fee just like

every other customer. Third, the Parties provided notice to all of the affected customers and provided a sufficient time period to allow those customers to opt out of the lawsuit. Some purchasers did opt out. The majority of the affected customers chose to be bound by the jury's verdict. The due process protections described in this paragraph are similar to those provided in Rule 23, SCRCP, and they were also sufficient to protect Hendrick's due process rights under the Dealers' Act. Again, the jury's verdict returning the entire amount of the closing fee to each customer shows that the claims of all customers were common and thus satisfied any due process concerns based on commonality.

Importantly, the "common or general interest to many persons" requirement in the Dealers Act is very similar to Rule 23, SCRCP's commonality/ typicality requirement. The language in both mechanisms is designed to make sure that the named plaintiff's claims are sufficiently similar to the other claimants' claims. Significantly, in this case, Hendrick never challenged whether Julie Freeman's claims were sufficiently "common" or of "general interest" to the claims of the other purchasers under the Dealers Act. Hendrick never argued that Julie Freeman's claims did not meet the express requirements of S.C.Code Ann. § 56-15-110(2). As such, Hendrick has waived its ability to raise commonality/typicality and any arguments that this finding is necessary should be rejected.

Furthermore, even if this Court rules that this case must be subject to Rule 23, SCRCP and is not permitted to proceed as a group under the express language provided in S.C.Code Ann. § 56-15-110(2), the remedy for this finding is not a grant of a new trial as requested by Hendrick. The facts of the case as it applies to all potential class members have already been determined by a jury and the affected class members have already made their pre-trial election

on whether to opt out. The only remedy available to Hendrick in that scenario would be a remand for the trial court to determine if the case fits the elements of Rule 23, SCRCP.

VI. THE JURY CHARGE CORRECTLY STATED THE LAW APPLICABLE TO THE EVIDENCE AND ISSUES PRESENTED AT TRIAL.[31]

A. Standard

"The law to be charged to the jury is determined by the evidence presented at trial...If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. In re Care and Treatment of Canupp, 380 S.C. 611, 616, 671 S.E.2d 614, 616 (Ct.App. 2008) (internal citations omitted). "Conversely, where a defendant requests a charge on a defense that is supported by the evidence presented at trial, the trial court is required to charge the jury on that defense..." State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). "The substance of the law is what must be instructed to the jury, not any particular verbiage." Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 496, 514 S.E.2d 570, 574 (1999)("Even though the jury charge in the present case was not a word for word quotation of previous case law, we believe that the charge adequately covered the law of South Carolina medical malpractice."). "A confusing charge alone is insufficient to warrant reversal." Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 497-98, 514 S.E.2d 570, 575 (1999). "[A] charge must be erroneous and prejudicial to warrant reversal...[A] jury charge, even if erroneous, on a matter not in issue, is not always considered prejudicial." Ardis v. Sessions, 682 S.E.2d 249, 250-51 (2009) (internal citations omitted).

[31]This section addresses arguments raised by Hendrick's brief section: III.

B. The Trial Court Properly Declined to Charge S.C.Code Ann. § 37-5-202(7)[32]

S.C.Code Ann. § 37-5-202 (7) is inapplicable and the trial court properly refused to charge this statute to the jury. S.C. Code Ann. § 37-5-202(7) provides:

> **A creditor may not be held liable in an action brought under this section** for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

This statute is not applicable because Ms. Freeman did not bring a claim under § 37-5-202. Instead, the cause of action was for violation of the Dealers Act. Furthermore, Hendrick was not a creditor in this case, did not lend money to Ms. Freeman, and thus this statute is inapplicable to Hendrick. Finally, the evidence showed that Hendrick knew they were limited to charging closing fees for reimbursement of closing costs (see General Manager and Vice President testimony as well as employee training testimony and signs posted in the dealership) and there was no testimony that Hendrick adopted any procedures to reasonably avoid the error of charging closing fees that were not for reimbursement of closing costs but instead to increase profit and pad senior management pay. In summary, this statute does not apply and the trial court did not err in refusing to charge it.

C. The Trial Court Properly Declined to Charge S.C.Code Ann. §37-6-104(4)[33]

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[32]This subsection addresses arguments raised in Hendrick's brief sections: I, D, 2, b; and III, A, 1, a.

[33]This subsection addresses arguments raised by Hendrick's brief sections: I, D, 2, a; and III, 1, a, 1.

S.C.Code Ann. § 37-6-104(4) is inapplicable and the absence of this charge does not warrant a new trial. S.C. Code Ann. § 37-6-104(4) provides:

> Except for refund of an excess charge **no liability is imposed under this title for an act done or omitted in conformity with a rule of the Administrator** notwithstanding that after the act or omission this rule may be amended or repealed or be determined by judicial or other authority to be invalid for any reason.

This statute does not apply. First, Ms. Freeman's cause of action was for violation of the Dealers Act and Ms. Freeman was not prosecuting a cause of action under the Consumer Protection Code. Second, this statute only applies to "rules of the Administrator" and actions done in conformity thereof. The Department of Consumer Affairs has not issued a rule stating that Hendrick could charge closing fees that were not for reimbursement of their closing costs.[34] Accordingly, this statute has no application to this case and § 37-6-104(4) does not apply to the cause of action or the facts at issue and the trial court was correct in refusing to charge this statute.

D. The Trial Court Properly Declined to Charge S.C. Code Ann. § 37-6-506(3).[35]

[34] The only thing the Department of Consumer Affairs has done is issue an official interpretation which Hendrick violated by charging closing fees that were not "a means of reimbursing it for certain overhead costs such as document retrieval and document preparation" as stated in the official interpretation. Hendrick's actions were in no way in conformity with this interpretation. Additionally, the trial court's charge instructed the jury that if the closing fees charged by Hendrick were for the purpose of reimbursing it for certain overhead costs such as document retrieval and document preparation (the same interpretation given by the Department of Consumer Affairs) then "that would pretty much be the end of your inquiry, because he had complied with the law." [R.p. __, trial transcript, pp. 892-893]. Accordingly, the charge at issue properly instructed the jury that Hendrick could not be liable if they complied with the Department of Consumer Affairs official interpretation. There was simply no reversible error arising from the refusal to charge Consumer Protection statutes that do not apply to the cause of action at issue.

[35] This subsection addresses arguments raised by Hendrick in section III, a, 1.

S.C.Code Ann. § 37-6-506(3) is also inapplicable and the trial court properly refused to charge this statute to the jury. S.C. Code Ann. § 37-6-506(3) provides:

> (3) No provision of this title or of any statute to which this title refers which imposes any penalty on any **creditor** shall apply to any act done, or omitted to be done, in conformity with any rule or regulation so adopted, amended or repealed or in conformity with any written order, opinion, interpretation or statement of the Commission or of the Administrator, notwithstanding that such rule, regulation, order, opinion, interpretation or statement may, after such act or omission, be amended, or rescinded or be determined by judicial or other authority to be erroneous or invalid for any reason.

S.C.Code Ann. § 37-6-506 (emphasis added). First, Hendrick was not a creditor of Ms. Freeman and their liability did not arise from the lending of money, thus this statute is inapplicable because it only applies to creditors. Second, there was no evidence in the case that Hendrick's actions in charging closing fees that were not for reimbursement of their closing costs were in conformity with the 2001 Consumer Affairs interpretation.[36] The 2001 interpretation does not authorize dealers to charge closing fees for profit or to pad senior management pay. Instead, the 2001 interpretation provides a disclosure that states the purpose of the fees which is "a means of reimbursing it for certain overhead costs such as document retrieval and document preparation." This is the same limitation included in the trial court's charge on the Closing Fee Statute and thus there was no need to charge this statute. The Court's existing charge made clear that no liability could be imposed if the fees were for the purpose of reimbursing closing costs. [R.p. __,

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[36]Hendrick misrepresents facts on page 53 of their memorandum when they state that "At trial, Collins testified that Hendrick Honda complied with its duties under the Closing Fee Statute required by the Administrative Interpretation. (Tr. At 607:20-609:20, 611:20-23, 617:4-618:3, R. at __)." This testimony in no way supports the factual assertion made by Hendrick. Collins never testified that he believed that Hendrick had complied with the administrative interpretation and he never testified that Hendrick charged its closing fee "as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation" as stated in the official interpretation. Hendrick's attempt to confuse the Court should be rejected.

trial transcript, pp. 892-893]. Thus, the Court did not err in refusing to charge this statute.

E. The Trial Court Properly Declined to Charge the Voluntary Payment Defense.[37]

The absence of a charge on the voluntary payment doctrine does not warrant a new trial. Ms. Freeman asserted a statutory cause of action against Hendrick alleging that Hendrick committed unfair and arbitrary acts under the Dealers Act. The voluntary payment defense does not apply to this type of statutory cause of action. The South Carolina Supreme Court in Hardaway stated:

> **Except where otherwise provided by statute**, a party cannot by direct action, or by way of set-off or counterclaim, recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed.

Hardaway v. S. Ry. Co., 90 S.C. 475, 73 S.E. 1020, 1025 (1912) (emphasis added). The language above expressly excepts statutory causes of action from the voluntary payment defense. Here, Ms. Freeman has asserted a statutory cause of action against Hendrick alleging that Hendrick committed unfair, unreasonable and bad faith acts under the Dealers Act. Accordingly, the voluntary payment defense does not apply to this statutory cause of action.

Any other ruling would nullify the protections of the Dealers Act and be contrary to the intent[38] of the legislature to protect consumers from unfair, unreasonable and bad faith acts

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[37]This subsection addresses arguments made by Hendrick's brief in section: I, D, 3; and III, 1, b.

[38]The Dealers Act is designed to protect consumers from unfair and arbitrary acts supplementing consumers' rights as they exist under the common law. *See* Herron v. Century BMW, 387 S.C. 525, 535, 693 S.E.2d 394, 399 (2010) cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872, 179 L. Ed. 2d 1184 (U.S.S.C. 2011) and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011) ("The purpose of the Dealers Act is consumer protection.").

committed by car dealers. Accordingly, the voluntary payment defense is not a valid legal defense to the claims at issue in this case.

Note that courts in other jurisdictions have looked at this issue and also held that the voluntary payment defense cannot be used to override statutory causes of action designed to protect consumers because the defense would defeat the purpose of legislative enactments. For example, the Missouri Supreme Court in Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721, 727 (Mo. 2009) (emphasis added) stated:

> Here, plaintiffs allege that Charter provided unsolicited merchandise to consumers in the form of the channel guide and then billed and collected, or attempted to collect, payment for the unordered merchandise. This conduct, if proven, is an unfair practice that is prohibited by the act. 15 CSR 60–8.060(1); section 407.020.1. **To allow Charter to avoid liability for this unfair practice through the voluntary payment doctrine would nullify the protections of the act and be contrary to the intent of the legislature**. In light of the legislative purpose of the merchandising practices act, the voluntary payment doctrine is not available as a defense to a violation of the act.

Similar reasoning was applied by a Nevada federal court in Sobel v. Hertz Corp., 698 F. Supp. 2d 1218, 1223-24 (D. Nev. 2010) which stated:

> The Legislature enacted both Nevada Revised Statutes section 482.31575 and the Deceptive Trade Practices Act primarily for the protection of consumers. (*See* Pls.' Req. for Judicial Notice (# 18), May 9, 1989, Minutes of the Nevada State Legislature, Ex. A at 11.) As the court stated in *Huch II,* the Legislature, having enacted "paternalistic legislation designed to protect those that could not otherwise protect themselves, ... would not want [those] protections ... to be waived by those deemed in need of protection." 290 S.W.3d at 727. "**To allow [the defendant] to avoid liability for [an] unfair practice through the voluntary payment doctrine would nullify the protections of the act and be contrary to the intent of the legislature**." *Id.* Accordingly, the court finds as a matter of law that Hertz cannot rely on the voluntary payment doctrine as a defense to Plaintiffs' claims.

Sobel v. Hertz Corp., 698 F. Supp. 2d 1218, 1223-24 (D. Nev. 2010) (emphasis added).[39]

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[39] See also Indoor Billboard/Wash. Inc. v. Integra Telecom of Wash., Inc., 162 Wash.2d 59, 170 P.3d 10, 24 (2007) ("[T]he voluntary payment doctrine is inappropriate as an affirmative defense in the [Consumer Protection Act] context, as a matter of law, because we construe the [Act] liberally in favor of plaintiffs."); Eisel v. Midwest BankCentre, 230 S.W.3d 335, 339–40

This Court should follow the reasoning used by these other courts in analyzing similar statutes designed to protect consumers from unfair acts. For example, in this case the jury found that Hendrick violated two statutes (the Dealers Act and the Closing Fee Statute included in the Consumer Protection Code) that are both to be liberally construed in favor of protecting consumers. *See* Davis v. Nations Credit Financial Services Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) ("[T]he South Carolina Consumer Protection Code, declares that it shall be liberally construed and applied to promote its underlying purposes and policies. S.C.Code Ann. § 37-1-102(1) (1989). One of the primary purposes of the Consumer Protection Code is to 'protect consumer buyers.'"); *see* Herron v. Century BMW, 387 S.C. 525, 535, 693 S.E.2d 394, 399 (2010) cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872, 179 L. Ed. 2d 1184 (U.S.S.C. 2011) and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011) ("The purpose of the Dealers Act is consumer protection."). The voluntary payment defense if applied would nullify both the Dealers Act's and the Closing Fee Statute's protections, is contrary to the intent of the legislature, would render these statutes meaningless, would result in an illegal windfall to Hendrick, and thus this defense is inapplicable.

Regardless, even if the voluntary payment defense were a proper defense to a Dealers Act cause of action, there was no evidence supporting the charge because there was no evidence that Mrs. Freeman paid the fee with "full knowledge of all the facts." See Town of Bennettsville v.

(Mo.2007) (because voluntary payment doctrine is based on waiver and consent, defendant could not assert defense to claim that it engaged in the unauthorized practice of law in violation of statute enacted for the protection of public); Ramirez v. Smart Corp., 371 Ill.App.3d 797, 309 Ill.Dec. 168, 863 N.E.2d 800, 810 (2007) ("[T]his state has an interest in transactions that violate 'statutorily-defined public policy.' The effect of such transgressive acts, generally speaking, is that the voluntary payment rule will not be applicable."); Pratt v. Smart Corp., 968 S.W.2d 868, 872 (Tenn.Ct.App.1997) ("[T]he State has an interest in transactions that involve violations of statutorily defined public policy, and, generally speaking, in such situations, the voluntary payment rule will not be applicable.").

Bledsoe, 226 S.C. 214, 218, 84 S.E.2d 554, 556 (1954) ("It is an elementary principle that no action will lie to recover money voluntarily paid with full knowledge of all the facts."). There was no evidence supporting a finding that Ms. Freeman knew the fee was illegal when she paid it, that she knew Hendrick was violating the Closing Fee Statute, that she knew what Hendrick's closing costs were when she paid the fee, that she knew how Hendrick had calculated the fee, or that she knew what costs Hendrick was seeking to recoup through the closing fee. The evidence at trial did not support a charge on the voluntary payment doctrine because there was no evidence supporting a finding that Ms. Freeman paid the fee with "full knowledge of all facts." Accordingly, the refusal to charge the voluntary payment doctrine in this case does not warrant the grant of a new trial.

F. The Trial Court Properly Declined to Charge Estoppel by Silence/Waiver[40]

Hendrick's argument that mere disclosure of the fact that they are charging closing fees warranted jury charges on waiver and/or estoppel by silence should be rejected. The evidence did not support charging either of these defenses to the jury. First, waiver, as conceded in Hendrick's memorandum, requires "that the party against whom waiver is asserted, possessed, at the time, actual or constructive knowledge of his rights or of all material facts upon which they depended." See Hendrick brief, p. 55. It is undisputed that there was no evidence presented that Julie Freeman had any knowledge about how Hendrick calculated their closing fee. Furthermore, there was no evidence presented to support a finding that Julie Freeman knew what Hendrick's closing costs were or that Hendrick was charging a closing fee that was not tied to reimbursing them for their actual closing costs. Also, the waiver defense fails because Hendrick cannot show any evidence supporting a finding that Ms. Freeman paid the closing fee knowing

[40]This section addresses arguments raised in Hendrick's brief section: III, A, 1, c.

that the fee was illegally charged. See Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-388 (1992)("A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended."). The evidence presented at trial did not support this defense and thus the absence of a waiver charge does not warrant the grant of a new trial and was not erroneous.

Similarly, there was no evidence supporting a charge on the doctrine of estoppel, which would require evidence that Ms. Freeman had "actual knowledge of the real facts" and that Hendrick "lacked knowledge or the means of acquiring with reasonable diligence knowledge of the true facts." See Hendrick's brief, p .56. There was no evidence presented that Ms. Freeeman had any knowledge about how Hendrick calculated the closing fee or what Hendrick's actual closing costs were. Thus, it would be impossible for a jury to find that Ms. Freeman had actual knowledge that Hendrick was charging closing fees unrelated to its actual closing costs. Also, there was no evidence that Hendrick lacked the knowledge or the means of acquiring with reasonable diligence knowledge of the true facts. Hendrick controlled the books and Hendrick's management knew that they were charging fees that were not to reimburse it for their actual closing costs, which admittedly had never been calculated. Hendrick's management also knew because they controlled access to the books that Julie Freeman had not been given access to this information. There was simply no evidence presented at trial to support charging estoppel to the jury.

Further, Hendrick cannot achieve a positive gain by asserting equitable estoppel and thus the defense does not apply to allow Hendrick to keep the illegally collected closing fees. See Ott

v. Ott, 188 S.E.2d 789, 792 (S.C. 1936) ("The final element of equitable estoppels is that the person claiming it must have been misled into such action that he will suffer injury if the estoppels is not declared....It was never intended *to work a positive gain to a party*."). Thus, there was no error in refusing to give this charge and a new trial is not warranted due to the failure to give this charge.

In addition, Hendrick's argument on waiver and estoppel by silence that the mere disclosure of the fact that they are charging closing fees prevents Ms. Freeman from bringing this lawsuit would render the Closing Fee statute meaningless and would result in the inequity of allowing unscrupulous dealers to collect illegal closing fees with no remedy for consumers. The Closing Fee statute legalizes the charging of closing fees for reimbursing closing costs with strict requirements. A dealership cannot be permitted, as Hendrick argues, to avoid all of these requirements simply by telling the customer that they are charging them a closing fee. Similarly, a dealer should not be allowed to charge unfair, unreasonable, and fees that violate the Dealers Act simply by disclosing they are charging the fee. Hendrick's assertion that merely telling a customer that it is charging them a closing fee prevents a consumer from bringing a lawsuit to recover the illegal fee would provide no protection from illegal closing fees for consumers. Thus, the Court was correct in refusing to charge waiver and/ the estoppel by silence charges requested by Hendrick.

G. The Court's Charge that An Act that Violates A Statute is Unfair is A Correct Statement of Law.[41]

Hendrick's arguments that the trial court erred in its charge concerning unfair acts because the Court charged the jury that an act that violates a statute is unfair should also be rejected. This is a correct statement of law. "An act is 'unfair' when it is offensive to public

[41]This subsection addresses the arguments in Hendrick's brief section III, A, 2, b.

policy or when it is immoral, unethical, or oppressive." Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). The public policy of South Carolina is expressed in the statutory law. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) ("The public policy of South Carolina is manifestly reflected in the penal statute with which Ludwick was compelled to comply."); White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) (contract is not enforceable that "violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); Nationwide Mut. Ins. Co. v. Rhoden, 398 S.C. 393, 403, 728 S.E.2d 477, 482 (2012), reh'g denied (July 31, 2012) (citing UIM statutes as establishing the public policy of South Carolina). Hendrick fails to cite to any case that supports Hendrick's arguments that it is a fair act for a defendant to violate a statute or that statutes do not express the public policy of South Carolina. Hendrick's argument that the Court erred in issuing this charge to the jury is not supported by the law and should be rejected.

Similarly, Hendrick's arguments that actions that violate a statute are not unfair acts under the Dealers Act should also be rejected. S.C.Code Ann. § 56-15-30 (a) provides: "Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful." This statute declares unfair acts to be unlawful. Also, the statute declares acts or practices as defined in § 56-15-40 which includes arbitrary/unreasonable acts to be unlawful. A car dealer's violation of a statute, in addition to being unfair, can also be arbitrary and unreasonable. Certainly, the jury could have reached this conclusion given the facts of this case. The jury could have also reached the conclusion that violation of the statute was in bad faith given the Vice President of Compliance's and the General Manager's admissions that they always knew they were limited to reimbursing themselves for closing costs through the closing fee. Thus, Hendrick was not harmed by the charge and there is no error in

charging the jury with a correct statement of law that an action that violates a statute is an unfair act under the Dealers Act. See Taylor v. Nix, 307 S.C. 551, 555-56, 416 S.E.2d 619, 621-22 (1992) (holding new trial not warranted where Court charged wrong definition of arbitrary under the Dealers Act) ("Furthermore, we find the defendants were not harmed by it as it is not conceivable under the facts of this case that the jury found the defendants acted merely maliciously arbitrary and not in bad faith."). The Court's charge on this issue does not warrant the grant of a new trial and was not erroneous.

H. The Trial Court Properly Declined to Charge Hendrick's Duty to Read Charge[42]

The Court did not err in refusing to charge Hendrick's "duty to read charge" which provided:

> Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One who signs a contract has the duty to exercise reasonable care to protect himself. **One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it**. The law does not impose a duty on one party to explain to an individual what he could learn from simply reading the documents.

Hendrick's brief, p. 57. This charge has no application to the cause of action at issue or the facts of this case as presented through the evidence at trial. Ms. Freeman has not submitted a claim for "fraud and misrepresentation in the contents of a document" where "the truth could have been ascertained by reading it." Ms. Freeman, instead, asserted a cause of action against Hendrick under the Dealers Act for unfairly, unreasonably, arbitrarily, and in bad faith charging closing fees that were not for the reimbursement of Hendrick's closing costs. This is not a fraud claim and Ms. Freeman could not have learned that Hendrick was charging baseless closing fees simply by reading any of the documents presented to her. More importantly, the alleged "truth"

[42]This subsection addresses the arguments raised in Hendrick's brief section: III, A, 1, d.

that Hendrick was charging closing fees to pad senior management pay and profit is not disclosed on any document given to Ms. Freeman. Thus, there was no way Ms. Freeman could have "ascertained" the truth "by reading" a document. This charge simply does not apply to the cause of action at issue or the evidence presented at trial. As such, the trial court was correct in declining to grant a new trial due to the absence of this charge.

I. The Trial Court's Charge on the Meaning of the Term Arbitrary Under the Dealers Act Was Proper.[43]

The jury charge included a statement that arbitrary acts violate the Dealers Act. [See eg. R.p. __, trial transcript, pp. 894-895]. Additionally, the charge included a statement that an unreasonable act is an arbitrary act. [R.p. __, trial transcript, p. 895, ll. 16-25]. Hendrick's argument that the Court needed to use particular verbiage beyond these definitions and also state that a Dealer's conduct is not arbitrary if it has "some reasonable basis" are wrong. "The substance of the law is what must be instructed to the jury, not any particular verbiage." Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 496, 514 S.E.2d 570, 574 (1999)("Even though the jury charge in the present case was not a word for word quotation of previous case law, we believe that the charge adequately covered the law of South Carolina medical malpractice."). Here the substance of the law was adequately charged. It is axiomatic that an unreasonable act does not have a reasonable basis. The language that Hendrick now argues should have been added would not have added anything to the charge and was not necessary. Accordingly, Hendrick's argument that a new trial is needed due to the decision not to charge Hendrick's particular verbiage should be rejected.

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[43]This subsection addresses the arguments raised in Hendrick's brief section: III, A, 2, c.

J. The Trial Court Properly Declined to Charge the Unconscionable Contract Charge.[44]

This case does not involve a defense that a written provision or term in a contract is unenforceable due to unconscionability. See e.g. S.C.Code Ann. § 36-2-302. Instead, this case included allegations that Hendrick violated the Dealers Act by charging a closing fee that was not for the purpose of reimbursing itself for closing costs. The actual components of the closing fee were at issue in the case and not any specific term, provision or language used in a written contract. As such, the requested charge which addresses "one-sided **provisions** together with **term**s that are ... oppressive" has no application to the allegations at issue and the trial court declined to charge same. Accordingly, the trial court did not err in refusing this charge and in finding that the absence of this charge did not warrant the grant of a new trial.

K. The Trial Court Properly Declined to Charge the Federal Trade Commission Discretionary Charge.[45]

Hendricks argues that the trial court should have issued a jury charge using 15 U.S.C. § 45(n) of the Federal Trade Commission Act. This statute provides in part:

> (n) Standard of proof; public policy consideration
>
> The Commission shall have no authority under this section or 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practices causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

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[44]This subsection addresses the arguments raised in Hendrick's brief section: III, A, 2, d.

[45]This subsection addresses the arguments raised in Hendrick's brief section: III, A, 2, b.

Hendrick cites S.C.Code Ann. § 56-15-30(b) of the Dealers Act as the basis for this argument. S.C.Code Ann. § 56-15-30(b) provides: "In construing paragraph (a) the courts may be guided by the definitions in the Federal Trade Commission Act (15 U.S.C. 45)."

15 U.S.C. § 45(n) was not applied to this case because it is not a definition. The Federal Trade Commission Act's definitions are listed in 15 U.S.C. § 44 entitled "Definitions" and in 15 U.S.C. § 55 entitled "Additional Definitions." 15 U.S.C. § 45(n) simply deals with the "Standard of proof; public policy consideration" to be applied by the Federal Trade Commission.

Even if 15 U.S.C. § 45(n) was a definition, which it is not, the charge at issue does not apply to the facts as established by the evidence at trial. Hendrick contends that because they disclose the closing fee on the invoice that the closing fee may be reasonably avoided by consumers. This argument should be rejected. In this case, the harm complained of is the charging of closing fees for purposes other than to reimburse closing costs. Consumers cannot reasonably avoid a dealer charging closing fees that are not for reimbursing closing costs because the consumer does not have access to the dealer's books and records and is not in a position to know whether they are paying the dealer a disguised profit or for the true reimbursement of the actual cost for closing the deal. Similarly, paying the fee is not reasonably avoidable as evidenced by Plaintiff's Ex. 17 which shows that <u>all</u> of Hendrick's customers paid the fee. [R.p. __].

Regardless, the trial court was not required to use any definition from the Federal Trade Commission Act because the Dealers Act makes this decision <u>discretionary</u> and does not mandate the use of any such definition. S.C.Code Ann. § 56-15-30(b) provides: "In construing paragraph (a) the courts **<u>may</u>** be guided by the definitions in the Federal Trade Commission Act

(15 U.S.C. 45)." (emphasis added). As such, the trial court's decision not to use the Federal Trade Commission charge at issue was not erroneous and does not warrant the grant of a new trial.

L. *The Damages Charge Was Correct.*[46]

Hendrick on page 58 of its memorandum argues that the Court erred by declining "the portion of the charge related to speculative damages." This argument should be rejected. The charge given succinctly set forth the standard to apply for damages and accurately stated that Ms. Freeman was limited to her actual damages. This was not a case involving potentially speculative damages, like lost profits, and as such an additional charge on speculative damages was not needed.

Also, the charge was correct in that it allowed the jury to determine what the damages were from zero to the full amount of the collected fee. The charge gave the jury discretion to determine if any part of the fee was for reimbursement of closing costs or not. The complete charge (Hendrick omits the last sentence in its brief) stated:

> [S]he cannot recover more than her loss. And as applied to this claim and the—if the Defendant's closing fees exceeded the amount necessarily reimburse the Defendant for his actual closing costs, then actual damages [are] a portion of that fee which exceeded the actual closing costs. So if you find that she's entitled to damages, obviously **you've got a wide range in this case, anywhere from zero to two hundred ninety-nine dollars**. Of course, she's the representative of the full class, so **if you find that maybe perhaps some it was involved in the closing, but not others, then you can—you have that discretion**.

[R.p. __, trial transcript, p. 897, l. 17 to p. 898, l. 5]. The jury applied this charge and found that none of the closing fees charged by Hendrick were for purposes of reimbursing Hendrick for its

[46]This section addresses the arguments raised in Hendrick's brief section: III, A, 1, e.

closing costs. The charge properly gave the jury discretion to determine what amount of the closing fee, if any, was legally collected.

Moreover, the charge is not inconsistent with the earlier portion of the charge that reads "you must make a determination in your findings, in this case your analysis must be whether or not what the dealer charged in this case was, in fact a closing fee as defined by the declaratory judgment order, or was it not a closing fee." [R.p. __, trial transcript, p. 893]. The charges are consistent and correct because both give the jury discretion to return the entire amount of closing fees collected if the jury determined that the fees were unfair, unreasonable, arbitrary, and in bad faith because the fees were not for purposes of reimbursing the dealer for its closing costs. Quite simply, Hendrick is not permitted to charge a fee that has nothing to do with reimbursing closing costs and then somehow get the benefit of an offset for what their closing costs could have been. See Kucharski v. Rick Hendrick Chevrolet Ltd. P'ship, 2002-UP-584, 2002 WL 31386090 (S.C. Ct. App. Sept. 18, 2002).[47] The trial court was correct; if none of the closing fee was charged to reimburse closing costs then the entire fee was unfair and represented the proper measure of damages to the customers. Any other interpretation would encourage car dealers to violate the Closing Fee Statute and charge excessive fees because the worst case scenario would be returning only a portion of the fees illegally taken from their customers. This result should be rejected because it would be inequitable and subvert the Dealer's Act's remedial purpose. Based on the foregoing, Hendrick's argument that the damages charge warrants a new trial should be rejected.

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[47] "To grant the offset to which the dealership claims to be entitled would confer a benefit which, in the context of the Dealers Act, would be inequitable and subvert the Act's remedial purpose.... Considering the Dealers Act remedial purpose, the jury was free to conclude that actual damages included the value of the vehicle without any offset allowed for the amount of the debt."

M. The Closing Fee Charge Was Correct[48]

As discussed in detail in Argument II above, the trial court's closing fee charge was correct. "S.C.Code Ann. § 37-2-307 authorizes the charging of "closing fees" which are for reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation." [R.p. _, Order, p. 10]. This definition is consistent with the usual and customary meaning of the term, the purpose of the statute, and the official administrative interpretation of the Closing Fee Statute.

VII. THE JURY VERDICT FORM WAS PROPER AND THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING A GENERAL JURY VERDICT FORM.[49]

A. Standard

> [T]he question of whether to require a jury to return a special verdict is one committed to the discretion of the trial court. *See* Rule 49(a), SCRCP ("The court *may* require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.") (emphasis added); *Butler v. Gamma Nu Chapter of Sigma Chi,* 314 S.C. 477, 483, 445 S.E.2d 468, 471 (Ct.App.1994) ("The question of whether to grant a party's request for a special verdict form is a matter committed to the sound discretion of the trial court."); 9 MOORE'S FEDERAL PRACTICE 3D § 49.11[2] [a], at 49-16 (1997) ("Rule 49 is a rule of discretionary implementation, solely in the control of the trial judge. No party has a right to the use of a special verdict.").... *See* 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958) ("Error in the refusal to submit special interrogatories or special issues to the jury will constitute ground for reversal only if prejudice results to the complaining party.").

Steele v. Dillard, 327 S.C. 340, 343, 486 S.E.2d 278, 279-80 (Ct. App. 1997).

"The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions." S. Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 908 (2007).

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[48]This subsection addresses the arguments raised in Hendrick's brief section: III, A, 2, a.

[49]This section addresses the arguments raised in raised in Hendrick's brief section: III, B.

B. Use of a General Verdict Form Was Proper, Not an Abuse of Discretion, and There Was No Prejudice to Hendrick.

In this case, the jury was given a general verdict form. There was no need for the special verdict form requested by Hendrick. The jury charges adequately described the law to be applied and there was no need for the questionnaire propounded by Hendrick. Moreover, there was no prejudicial effect in using the general verdict form because, as admitted by Hendrick on page 66 of their brief, the Court provided sufficient instructions that set forth the same process as outlined on Hendrick's proposed verdict form. See South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 908 (2007) ("The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions.").

Last, the jury returned the entire amount of every closing fee charged to the customers. This amount was included on Plaintiff's Exhibit 17 which was the stipulated closing fees collected by Hendrick. [R.p. __]. There is no prejudice created by use of the general verdict form because the dollar amount returned is the same as that set forth on Plaintiff's Exhibit 17. The jury's verdict is self-explanatory and amounts to a return of the closing fees collected from all represented purchasers. There was no need for a questionnaire to understand the jury's finding and thus there is no need for a new trial to be granted due to the use of a general verdict form.

VIII. A NEW TRIAL NISI REMITTITUR IS NOT WARRANTED.[50]

A. Standard

> The trial court alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. However, compelling

[50]This section addresses the arguments raised in Hendrick's brief section: III, C.

> reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur.* The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.

Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 320-22, 628 S.E.2d 496, 518-19 (Ct. App. 2006). "The jury's determination of damages, however, is entitled to substantial deference." Id.

B. *There Are No Compelling Reasons Present to Invade the Jury's Province and Order a New Trial Nisi Remittitur.*

As discussed in detail above, the evidence could reasonably be construed to show that Hendrick unfairly, unreasonably, arbitrarily, and in bad faith charged closing fees that were not for purposes of reimbursing their closing costs and instead charged closing fees to pad management pay and profit. The verdict amount was not excessive as it was for exactly the amount of unfair closing fees collected by Hendrick. Moreover, there are no compelling reasons present to invade the jury's province. Thus, the trial court was correct in denying the requested *New Trial Nisi Remittitur.*[51]

VIII. THE TRIAL COURT PROPERLY DOUBLED THE ACTUAL DAMAGES AS ESTABLISHED BY THE JURY.[52]

The trial court properly found that Ms. Freeman is entitled to double damages under S.C.Code Ann. § 56-15-110 which provides in part:

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[51] Furthermore, even if this Court rules that this case must be subject to Rule 23, SCRCP and is not permitted to proceed as a group under the express language provided in S.C.Code Ann. § 56-15-110(2), the remedy for this finding is not a grant of a new trial nisi remittitur as requested by Hendrick. The facts of the case as it applies to all potential class members have already been determined by a jury and the affected class members have already made their pre-trial election on whether to opt out. The remedy available to Hendrick in that scenario would be a remand for the trial court to determine if the case fits the elements of Rule 23, SCRCP. If the case fits those elements, the verdict would stand.

[52]This section addresses the arguments raised in Hendrick's brief section: IV.

> (1) In addition to temporary or permanent injunctive relief as provided in § 56-15- 40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and **shall recover double the actual damages by him sustained**, and the cost of suit, including a reasonable attorney's fee.
>
> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

S.C.Code Ann. § 56-15-110(1) and (2) (emphasis added).

The jury in this case found that the actual damages sustained were $1,445,786.00. Pursuant to the above statute, this amount "shall" be doubled so that Ms. Freeman and the car purchasers recover $2,891.572.00. In this scenario, the amount of actual damages is a question of fact for the jury. After the amount of actual damages was determined, the doubling occurs as a matter of law because there is no discretion in the statute; the actual damages "shall" be doubled. This is not a question of fact. It is a question of law and outside the province of the jury. As such, the trial court properly doubled the amount of actual damages as found by the jury.

This Court should reject Hendrick's argument that Ms. Freeman's prosecution of this case on behalf of a group under S.C.Code Ann. §56-15-110(2) prevents her from recovering double damages under S.C.Code Ann. § 56-15-110(1). This argument is contrary to the plain language used in subsection 2 ("When such action") which clearly refers back to subsection 1. Moreover, this interpretation is contrary to the liberal construction to be used when interpreting remedial statutes such as the Dealers Act. *See* Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (S.C. Ct. App. 2002) ("This action is based not on a common law tort or on contract but is a creature of statute. The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed inadequate. Remedial statutes are to be

construed liberally in order to effectuate their purpose."); Herron v. Century BMW, 387 S.C. 525, 535, 693 S.E.2d 394, 399 (2010) cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872, 179 L. Ed. 2d 1184 (U.S.S.C. 2011) and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011). ("The purpose of the Dealers Act is consumer protection."). Based on the foregoing, this Court should affirm Judge Early' Order doubling the actual damages in this case.

CONCLUSION

In the end, the jury agreed with Hendrick's Vice President of Transaction Compliance, whose testimony is suspiciously absent from Hendrick's brief, that:

1. it is unfair to charge a closing fee that was not for reimbursing a dealer's closing costs[53];
2. use of the name "administrative fee" required that closing fee be limited to document retrieval and document preparation[54];
3. when a dealer posts signs saying that they were reimbursing themselves for certain overhead costs that the dealer should know what those costs were before they charged the fee[55];
4. it is unfair for a dealer to charge a closing fee without knowing what their document preparation and retrieval costs are before they seek to reimburse themselves for those costs[56];
5. it is unfair for a dealer to charge a closing fee that was not tied to their actual closing costs[57]; and
6. "if a dealership is going to charge a fee and call it by a name, that the fee has to be for reimbursement of cost related to that name."[58]

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[53] [R.p. __, trial transcript, p. 308, l. 17 to p. 309, l. 6].

[54] [R.p. _, trial transcript, p. 305, ll. 18-22; p. 308, ll. 17-20].

[55] [R.p. __, trial transcript, p. 305, l. 23 to p. 306, l. 3].

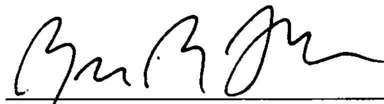
[56] [R.p. __, trial transcript, p. 308, l. 21 to p. 309, l. 2].

[57] [R.p. __ trial transcript, p. 309, ll. 3-6].

Hendrick failed to do any of the things it knew it was supposed to do in order to comply with the Closing Fee Statute and to be fair to its customers. Hendrick's actions were unfair, unreasonable, arbitrary, and in bad faith in clear violation of the Dealers Act.

Moreover, as discussed in detail above, the trial court properly applied the law and thus the judgment rendered by the jury in this case should be affirmed.

Respectfully submitted,



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[58] [R.p. __, trial transcript, p. 305, ll. 18-22].

ATTORNEYS FOR THE APPELLANT-RESPONDENT

September 8, 2014

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

SEP - 8 2014

S.C. Supreme Court

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-39-01554

Appellate Case No. 2014 - 000642

Julie Freeman...Appellant – Respondent

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley....................Respondent – Appellant

PROOF OF SERVICE

The undersigned employee of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for the Respondent, do hereby certify that service of the

INITIAL RESPONSE BRIEF OF APPELLANT-RESPONDENT

was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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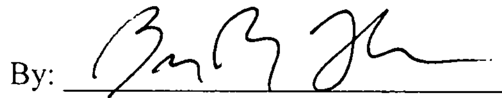
By: 

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